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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 16.

TOMAS C. GUTIERREZ ET AL., APPELLANTS,

vs.

THE ALBUQUERQUE LAND AND IRRIGATION COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

(17,602.)

(17,802.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 85.

TOMAS C. GUTIERRES ET AL., APPELLANTS,

vs.

THE ALBUQUERQUE LAND AND IRRIGATION COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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1 In the Supreme Court of the United States.

ALBUQUERQUE LAND & IRRIGATION COMPANY, Appellee,
vs.
TOMAS C. GUTIERRES, PEDRO GRIEGO Y APODACA, JESUS Zamora, Benito Jaramillo, and Leon Montoya, Appellants. } No. —.

Be it remembered, that heretofore, on the 7th day of December, A. D. 1899, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, a transcript of record in the above-entitled cause, which said transcript of record was and is in words and figures, as follows, to wit:

2 In the Supreme Court of the Territory of New Mexico.

THE ALBUQUERQUE LAND AND IRRIGATION COMPANY *et al.*, Appellees,
vs.
TOMAS C. GUTIERREZ ET AL., Appellants. } No. —.

Transcript of Record.

Appeal from the district court in and for the county of Santa Fé, first judicial district, on a change of venue from the county of Bernalillo, second judicial district.

In the District Court of the First Judicial District of the Territory of New Mexico within and for the County of Santa Fé.

3 THE ALBUQUERQUE LAND AND IRRIGATION COMPANY *et al.*
vs.
TOMAS C. GUTIERREZ ET AL. } No. 3956. Civil.

Be it remembered that heretofore, to wit, on the 25th day of May, A. D. 1898, there was filed in the office of the clerk of the district court of the first judicial district of the Territory of New Mexico, within and for the county of Santa Fé, a transcript of record entries from the district court of second judicial district of said Territory of New Mexico, in and for the county of Bernalillo, which said transcript is in words and figures following, to wit:

TERRITORY OF NEW MEXICO,
County of Bernalillo, Second Judicial District, } *ss:*

Be it remembered that on the 17th day of January, A. D. 1898, there was filed and entered of record in the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, an order, which said order is in words and figures as follows, to wit:

THE ALBUQUERQUE LAND AND IRRIGATION COMPANY
vs. } 4956.
TOMAS C. GUTIERREZ ET AL.

Upon reading the foregoing complaint, it is ordered that a temporary restraining order issue as prayed for, upon the plaintiff filing bond and sureties to be approved by the clerk of this court,
4 in the sum of five hundred dollars, conditioned to pay all damages that may result or arise by reason of said injunction being granted, and that defendants show cause on the 25th day of January, 1898, if any they have, why said injunction should not be continued.

It is further ordered that a copy of this order be served upon these defendants at least five days before the said twenty-fifth day of January, 1898, when they are required to show cause.

Done this 17th day of January, 1898.

J. W. CRUMPACKER, *Judge, etc.*

And be it further remembered that afterwards, to wit, on the 25th day of January, A. D. 1898, in the said district court, the following proceedings were had and entered of record.

THE ALBUQUERQUE LAND AND IRRIGATION COMPANY
vs.
TOMAS GUTIERREZ ET AL.

On motion of plaintiff, the hearing of this cause is this day continued until January 27th, at ten o'clock in the forenoon.

And it is further ordered that the injunction heretofore granted herein be and the same is hereby continued until the further order of the court in the premises.

J. W. CRUMPACKER, *Judge, etc.*

And be it further remembered that afterwards, to wit, on the 26th day of January, A. D. 1898, in the said district court, the following proceedings, were had and entered of record:

5 THE ALBUQUERQUE LAND AND IRRIGATION COMPANY
vs.
TOMAS C. GUTIERREZ ET AL.

Upon the suggestion of the illness of E. W. Dobson, counsel for plaintiff herein, by consent of the parties the hearing herein set for January 27th, is postponed until the 28th day of January, 1898, at ten o'clock in the forenoon.

And it is further ordered that the injunction heretofore granted in this cause be continued until said twenty-eighth day of January, 1898.

J. W. CRUMPACKER, *Judge, etc.*

And be it remembered that afterwards, to wit, on the 8th day of February, A. D. 1898, there was filed and entered of record in the

said district court for the county of Bernalillo, an order, which said order is in words and figures following, to wit:

THE ALBUQUERQUE LAND AND IRRIGATION COMPANY
vs.
TOMAS C. GUTIERREZ ET AL.

This cause having heretofore been heard upon the complaint of the plaintiff herein and the answer of the defendants and demurrer of said plaintiff to the new matter contained in the said answer of the said defendant-, and the same having been taken under advisement by the court and the court being now sufficiently advised, it is.

Ordered, adjudged and decreed that the injunction heretofore granted, restraining the said defendants and each of them from obstructing and delaying the plaintiff, The Albuquerque Land
6 and Irrigation Company, its agents, servants and employés, from proceeding with the examination and survey, by obstructing, preventing and hindering their entrance upon and along lands lying and being at, near and along the proposed route for the canal, ditch and pipe line beginning at a point on the east bank of the Rio Grande, south or near the Indian pueblo of San Felipe, in the county of Bernalillo and Territory of New Mexico, and the terminus of said line to be at a point south near the railway bridge of the Atchison, Topeka and Santa Fe railway, at Isleta, also in said county of Bernalillo, the general course and direction of said main line being southerly, east of the east bank of the said river, along and under the foot-hills, through the city of Albuquerque, and the length thereof estimated to be thirty-five miles, more or less, or otherwise be, and the same hereby is continued until the further orders of this court.

And it is further ordered that the injunction prayed for by the defendants in their cross-complaint in this cause be and the same is hereby denied; the court reserving to itself for future determination the entering of an order upon the demurrer to the new matter in said answer, and the demurrer to the said cross-complaint: this order not to be construed as passing upon the said demurrers, or either of them, in any respect whatever.

J. W. CRUMPACKER, *Judge, etc.*

And be it further remembered that at a regular term of the district court of the second judicial district of the Territory of New Mexico, begun and held within and for the county of Berna-
7 lillo, at the court-house in the city of Albuquerque, in said county, on the first Monday of March, 1898, and on the 6th day of said term, the same being the twelfth day of March, 1898, the following among other proceedings were had and entered of record, to wit:

Present: The Hon. J. W. Crumpacker, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district thereof, presiding.

THE ALBUQUERQUE LAND AND IRRIGATION COMPANY
vs.
TOMAS C. GUTIERREZ ET AL. } 4956.

The above cause coming on to be heard upon the demurrer to the answer and to the cross-complaint therein, and the court having taken the same under advisement, and being now fully advised, doth order and adjudge that the said demurrer be and the same is hereby overruled, and that the plaintiff and cross-defendant do forthwith reply to the new matter in said answer and answer the said cross-complaint; to which order and judgment overruling the said demurrer the said plaintiff and cross-defendant excepts.

And be it further remembered, that afterwards, to wit, on the eighteenth day of May, A. D. 1898, in said district court the following proceedings were had and entered of record:

THE ALBUQUERQUE LAND AND IRRIGATION COMPANY
vs.
TOMAS C. GUTIERREZ ET AL.

8 This cause is this day heard upon defendants' motion and affidavits in support thereof, for a change of venue therein, as well as upon plaintiff's objections thereto and counter-affidavits filed herein, and the court having heard the arguments of counsel, Neill B. Field, Esq., representing the defendants and N. C. Collier, Esq., and E. W. Dobson, Esq., representing the plaintiff, and now being fully advised in the premises;

It is considered and ordered by the court that the venue in this cause be and the same hereby is changed from this county to the county of Santa Fé, in the first judicial district, Territory of New Mexico, and the clerk of this court is directed to transmit the papers together with a transcript of the record in said cause within ten days to the clerk of said district court of the first judicial district within and for the county of Santa Fé, in the Territory of New Mexico.

J. W. CRUMPACKER, *Judge.*

TERRITORY OF NEW MEXICO,
Second Judicial District, County of Bernalillo, } *ss:*

I, Harry P. Owen, clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, do hereby certify that the above and foregoing is a full, true and complete copy and transcript of the proceedings had and entered of record in the said district court for the county of Bernalillo, in the cause of The Albuquerque Land and Irrigation Company against Tomas C. Gutierrez, *et al.*, No. 4956, as the
9 same remains of record in my said office. And I further certify that all the papers filed in my said office are set forth in said transcript.

Witness my hand and the seal of said district court at my office in Albuquerque, New Mexico, this 18th day of May, 1898.

[SEAL.] HARRY P. OWEN,
Clerk of said District Court.

Costs in Bernalillo County.

	Clerk.	Sheriff.
Paid by pl't'ff.....	$8 60	$7 00
Paid by def'ts.....	2 45	P'd by pl't'ff
	$11 05	

And afterwards, to wit, on the day and year last aforesaid, there was also filed in the district court of the first judicial district of the Territory of New Mexico, within and for the county of Santa Fé, accompanying said transcript of record hereinbefore set out, from the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, complainant's bill of complaint, which said bill of complaint is in words and figures following, that is to say:

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting within and for the County of Bernalillo.

THE ALBUQUERQUE LAND AND IRRIGATION CO., Plaintiff,
vs.
TOMAS C. GUTIERREZ, PEDRO GRIEGO Y APODACA, JESUS Samora, Benito Jaramillo, Leon Montoya, Defendants.

10 1. The Albuquerque Land and Irrigation Company, a corporation organized under the laws of the Territory of New Mexico and having its principal place of business at Albuquerque, in the county of Bernalillo in said Territory, complains of the above-named defendants, all residents of the county of Bernalillo, and such other persons whose names it may hereafter desire to add as parties to this suit, in an action for relief and injunction.

2. Plaintiff shows that it is a corporation organized under an act of General Assembly of the Territory of New Mexico, entitled "An act to authorize the formation of companies for the purpose of constructing irrigating and other canals, and colonization and improvement of lands," approved February 24th, 1887; the date of its articles of incorporation being the 31st day of December, 1897, a copy of which said articles are hereto annexed, marked Exhibit "A," referred to and made a part of this complaint.

3. Plaintiff further shows that under said act it is provided that if any corporation formed thereunder shall not commence the transaction of its business within one year from the time of the filing of its articles of -corporation, its corporate powers shall cease.

4. Plaintiff further shows that, as stated in its said articles of incorporation, it has been organized for the purpose of constructing

and maintaining reservoirs, canals, ditches and pipe lines, for the supplying of water for irrigation and colonization and improvement of lands in connection therewith; being so organized and incorporated, it is given the right to cause such examinations and
11 surveys of lands for its proposed reservoirs, canals, pipe lines and ditches, as may be necessary to the selection of the most eligible locations and advantageous routes, and for such purpose, by its officers, agents and servants, to enter upon the lands and water of any person or of this Territory along the route of its proposed canal, pipe lines and ditches.

5. Plaintiff further shows that it has the right to hold and own real estate and other property acquired either by purchase, gift or by condemnation where the same cannot be acquired by agreement with the owners thereof, in furtherance of the purpose of its organization; and do all other things necessary and proper in the prosecution of its business and towards the building and construction of reservoirs, canals, ditches, pipe lines.

6. Plaintiff further shows that the proposed route of its canal, ditch and pipe line is as set forth in its articles of incorporation, as follows, to wit: The beginning point of the main line of said canals, ditches, pipe lines and feeders for said reservoirs shall be at a point on the east bank of the Rio Grande south of and near the Indian pueblo of San Felipe, in the county of Bernalillo and Territory of New Mexico, and terminus of said main line shall be at a point to the south near the railway bridge of the Atchison, Topeka and Santa Fe railway, at Isleta, also in said county of Bernalillo. The general course and direction of said main line shall be southerly, east of the east bank of said river along and under the foot-hills through the city of Albuquerque, and the length thereof shall be thirty-five miles, more or less.

12 7. Plaintiff further shows that after having become organized as aforesaid, its board of directors employed a civil engineer and other officers, agents and servants to begin on the preliminary survey for the purpose of determining, fixing and locating the exact line and most advantageous route for its proposed canal, ditch and pipe line, and which said canal, ditch and pipe line it in good faith proposes to construct and maintain; and said civil engineer with said other servants, in pursuance of such employment and proceeding upon the line as designated in said articles of incorporation, began at the said city of Albuquerque, and going northerly upon various and sundry strips of land, made examination and survey for the purpose of ascertaining, determining and selecting eligible locations and an advantageous route for said proposed canal, ditch and pipe line; and in so doing had proceeded northerly to the extent and distance of about three and a half miles, when the said civil engineer and said other servants of plaintiff were by the said defendants and other persons to this plaintiff unknown, forcibly resisted, impeded, hindered, prevented and stopped from entering upon and making survey of land to the north of the point they had reached, and that it became and was impossible for said civil engineer and said other servants to further proceed with the making of such examina-

tion and survey because and by reason of the forcible resistance then and there made and interposed by said defendants and such other persons to this plaintiff unknown.

8. Plaintiff further shows that the said civil engineer and
13 its other servants and agents, having been prevented as aforesaid from proceeding with such examination and survey, did afterwards, to wit, on Monday, the 17th day of January, 1898, proceed again to said point where such forcible resistance and prevention had been made as aforesaid, and did again attempt to proceed with said examination and survey; and the said defendants and other persons to this plaintiff unknown did, by acts of force and intimidation, prevent and resist the entering upon the land lying immediately north of the point said surveyors had reached, and did then and there state, say and give out that they, the said defendants would, as often as said examination and survey should be attempted to be proceeded with, interpose and forcibly prevent the same; said defendants and other persons stating that they would resist, oppose and obstruct the making of any and all surveys and examinations attempted to be made by the plaintiff, its agents and servants for the purpose of locating, determining and fixing any route for its proposed canal, ditches and pipe lines; they, the said defendants and other unknown persons, then and there well knowing that the purpose and object of said civil engineer and said other servants was to locate and select eligible locations and an advantageous route for the plaintiff in the prosecution of its work of building said canal, ditch and pipe line.

9. Plaintiff further shows that it is informed and believes that the defendants and said other unknown persons, pretend to claim and own some right, title or interest in the land, entrance upon which they offered and threatened to continue to offer forcible re-
14 sistance, and that they claim and pretend that being the owners of said right, title and interest, this plaintiff by its agent and servants, has no lawful right to enter thereon for the purpose of making such examination and survey and not that said land will be injured or damaged in any way, manner or form by said entrance for the purpose aforesaid and not that the said plaintiff could not and would not respond to any damage that might ensue from such entrance for said purpose.

10. Plaintiff further shows that the said forcible resistance, if continued, will result in irreparable injury to the plaintiff, and will delay, prevent and hinder the carrying out of the object of the plaintiff as a corporation and interfere with, prevent and obstruct it in the selection of suitable locations and routes for its proposed canal, ditch and pipe line.

Wherefore plaintiff prays that the said defendant and such other persons whose names are unknown and when ascertained, their names to be added as parties defendant to this complaint, may be perpetually enjoined from hindering, preventing and obstructing plaintiff and its servants and agents from entering upon all or any lands whether said land be claimed or any right, title or interest therein be claimed by said defendants or any of said person or per-

sons at, near and along the line beginning at a point on the east bank of the Rio Grande south of and near the Indian pueblo of San Felipe in the county of Bernalillo and Territory of New Mexico and the terminus of said line to be at a point to the south near the
15 railway bridge of the Atchison, Topeka and Santa Fe railway at Isleta in said county of Bernalillo; the general course and direction of said line to be southerly, east of the east bank of the said river along and under the foot-hills through the city of Albuquerque, and the length thereof to be thirty-five miles, more or less, for the purpose of making examinations and surveys to the end of selecting eligible locations for the proposed reservoirs and an advantageous route for the proposed canal and ditch to the plaintiff, and that in the meantime a temporary restraining order issue out of this court enjoining and preventing each and every of said defendants and said other unknown persons from hindering, preventing, obstructing or delaying said plaintiff and its agents and servants from proceeding with the prosecuting and continuing said examination and survey by entering upon all lands along and near said proposed route; and that plaintiff have such other and further relief in the premises as to your honor shall seem meet and equity and justice shall require.

THE ALBUQUERQUE LAND AND IMPROVEMENT CO.,
By C. K. NEWHALL, *Sec'y.*

COLLIER & MARRON AND
CHILDERS & DOBSON,
Attorneys for Plaintiff.

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

P. E. Harroun being duly sworn, deposes and says that he is the agent and employé of the plaintiff in the foregoing complaint; that the same is true to the knowledge of affiant, except as to
16 those matters stated on information and belief, and as to those matters, he believes them to be true.

(Signed) P. E. HARROUN.

[SEAL.] Subscribed and sworn to before me this 17th day of January, A. D. 1898.

(Signed) E. L. MEDLER,
Notary Public.

Upon reading the foregoing complaint, it is ordered that a temporary restraining order as prayed for, upon the plaintiff filing bond with sureties to be approved by the clerk of this court, in the sum of five hundred dollars, conditioned to pay all damages that may result or arise by reason of said injunction being granted, and that defendants show cause on the 25th day of January, 1898, if any they have, why said injunction should not be continued.

It is further ordered that a copy of this order be served upon said defendants at least five days before the said 25th day of January 1898, when they are required to show cause.

(Signed) J. W. CRUMPACKER, *Judge.*

Done this 17th day of January, 1898.

And afterwards, to wit, on the day and year last aforesaid, there was also filed in the office of the clerk of the district court within and for the county of Santa Fé, accompanying said transcript of record entries hereinbefore set out, from the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, an exhibit marked "Exhibit A to Complaint," which said exhibit is in words and figures following, to wit:

17 Know all men by these presents; that we, Angus A. Grant, Mariano S. Otero, Louis Ilfeld, Matthew W. Flournoy, Martin P. Stamm, William B. Childers and Owen N. Marron, each and every of whom is a citizen of the United States and a resident of the Territory of New Mexico, desiring to form a company for the purposes hereinafter set forth, have voluntarily associated ourselves together as a body politic and corporate under the laws of the Territory of New Mexico, and to that purpose we make and sign the following articles of incorporation certifying as follows, to wit:

1. The full names of the said incorporators are Angus A. Grant, Mariano S. Otero, Louis Ilfeld, Matthew W. Flournoy, Martin P. Stamm, William B. Childers and Owen N. Marron and the corporate name of said company is the Albuquerque Land and Irrigation Company.

2. The purpose for which said company is formed and created a body politic and corporate is to build, construct and maintain reservoirs, and feeders therefor, canals, ditches, pipe lines, flumes and such branch lateral and side canals, pipe lines, ditches and flumes as may be necessary for the supplying of water for the purpose of irrigation and the improvement and the colonization of lands in connection with such irrigation; and to acquire, purchase, lease and sell water, water rights, reservoirs, canals, ditches, pipe lines, flumes and lands in the furtherance of said purpose.

3. The beginning point of the main line of said canals, ditches, pipe lines and feeders for said reservoirs shall be at a point
18 on the east bank of the Rio Grande south of and near the Indian pueblo of San Felipe, in the county of Bernalillo and Territory of New Mexico, and the terminus of the said main line shall be at a point to the south near the railway bridge of the Atchison, Topeka and Santa Fe railway at Isleta, also in said county of Bernalillo. The general course and direction of said main line shall be southerly, east of the east bank of said river along and under the foot-hills through the city of Albuquerque and the length thereof shall be thirty-five miles, more or less.

3. The amount of the capital stock shall be the sum of one hundred thousand dollars, consisting of ten thousand shares, each of the par value of ten dollars.

4. The time for which said corporation is to exist is fifty years from and after the date of its corporation.

5. The number of the directors of said corporation shall be seven and the names and residences of those appointed to manage its business for the first year are, Angus A. Grant, Mariano S. Otero, Louis Ilfeld, Matthew W. Flournoy, Martin P. Stamm, William B. Childers and Owen N. Marron, each of said persons being a resident of the city of Albuquerque, in the county of Bernalillo and Territory of New Mexico.

6. The principal place of business of said corporation shall be the city of Albuquerque in the county of Bernalillo and Territory of New Mexico.

In witness whereof, we have hereunto set our hands and seals this 30th day of December, A. D. 1897.

ANGUS A. GRANT. [SEAL.]
MARIANO S. OTERO. [SEAL.]
LOUIS ILFELD. [SEAL.]
MATTHEW W. FLOURNOY. [SEAL.]
MARTIN P. STAMM. [SEAL.]
WILLIAM B. CHILDERS. [SEAL.]
OWEN N. MARRON. [SEAL.]

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

Be it remembered that on this 30th day of December, A. D. 1897, before me, the undersigned a notary public in and for the said county of Bernalillo, personally appeared Angus A. Grant, Mariano S. Otero, Louis Ilfeld, Matthew W. Flournoy, Martin P. Stamm, William B. Childers and Owen N. Marron, to me personally known to be the same persons described in and who executed the foregoing instrument and each acknowledged to me that he executed the same for the uses and purposes therein mentioned and that the same was his free act and deed.

Witness my hand and official seal the day and year in this acknowledgment first above written.

[NOTARIAL SEAL.] JOHN M. MOORE,
Notary Public, Bernalillo Co., N. M.

TERRITORY OF NEW MEXICO, }
Office of Secretary, } *ss:*

I have compared the preceding copy of the articles of incorporation of the Albuquerque Land and Irrigation Company with the original copy thereof now on file in this office and I hereby certify the same to be a correct transcript therefrom and of the whole thereof.

[TERRITORIAL SEAL.] Witness my hand and seal of the secretary of the Territory, at Santa Fé, the thirty-first day of December, one thousand eight hundred and ninety-seven.

GEO. H. WALLACE,
Secretary of New Mexico.

And afterwards, to wit, on the day and year last aforesaid, there was also filed in the office of the clerk of the district court within and for the county of Santa Fé, accompanying said transcript of record entries, hereinbefore set out, from the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, an answer and cross-complaint of said defendants, which said answer and cross-complaint is in words and figures as follows, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting within and for the County of Bernalillo.

THE ALBUQUERQUE LAND AND IRRIGATION COMPANY, Plaintiff,
vs.
TOMAS C. GUTIERREZ, PEDRO GRIEGO Y APODACA, JESUS SAMORA, BENITO JARAMILLO, and LEON MONTOYA, Defendants.

21 *The Joint and Several Answer of the Defendants, Tomas C. Gutierrez, Pedro Griego y Apodaca, Jesus Samora, Benito Jaramillo, and Leon Montoya to the Complaint of the Plaintiff, The Albuquerque Land and Irrigation Company.*

I.

Defendants admit that the plaintiff has filed articles or incorporation as alleged in the complaint, and that by the provisions of the law under which the said plaintiff is incorporated its powers as a corporation will cease unless it shall commence the transaction of the business for which it is organized within one year from the time of filing its articles of incorporation.

II.

Upon information and belief defendants deny that the said plaintiff is organized for the purpose of constructing and maintaining reservoirs or pipe lines for the purpose of supplying water for colonization of lands, and the defendants are advised and believe and therefore charge that the said plaintiff is not entitled, for reasons hereinafter stated, to enter upon the lands or waters of any person or persons within this Territory for the purpose of surveying the same without the consent of the owner or owners of such lands or waters.

III.

These defendants are advised by counsel and believe and therefore charge that it is immaterial whether or not the plaintiff is entitled to own and hold real estate and other property
22 acquired by purchase, gift or by condemnation, for the reason as these defendants allege that they are informed and believe that the said plaintiff is not the owner of any irrigable lands along the line of the canal or ditch which the said plaintiff is proposing to construct, nor is the said plaintiff, as defendants are informed and believe, the owner of any reservoir site or other place for the hold-

ing or storing of water, nor is the said plaintiff as defendants are informed and believe the owner of any water right by or under which the said plaintiff can obtain water for its said proposed ditch or canal when the same shall be constructed, nor has the said plaintiff, as defendants are informed and believe, any contract with or employment by any person or persons owning lands irrigable from the said proposed ditch or canal when completed for carrying or delivering water to such lands but on the contrary thereof these defendants are informed and believe, and therefore charge the fact to be that the said plaintiff is proposing to divert the waters of the Rio Grande, all of which have been heretofore appropriated by these defendants and other persons to the number of many thousands of people, through its said proposed ditch or canal for the purpose of selling the same for purposes of pecuniary profit and speculation only and the said plaintiff gives out and pretends that by the construction of its said proposed ditch or canal and diverting the waters of the Rio Grande through the same, it, the said plaintiff, will acquire title to so much of the waters of the said Rio Grande as may be so diverted, and the said defendants are informed and believe and so charge that the examination and surveys which the said plaintiff is seeking and attempting to make upon the
23 lands of these defendants and their associates *is* for the purpose of locating a ditch or canal to be used for the conducting and diverting the said waters of the Rio Grande, to the use of which the said plaintiff has no right, and to which, as these defendants are advised, right of use cannot be obtained for purposes of irrigation except in connection with the ownership of land and these defendants are advised and believe and therefore charge that the said plaintiff is not empowered and could not be empowered to exercise the right of eminent domain for the securing of lands for the right of way of such a ditch or canal as the said plaintiff is proposing to construct.

IV.

Defendants admit that the proposed route of the ditch or canal of the plaintiff is as alleged in the sixth paragraph of the complaint, but the defendants on information and belief deny that the said plaintiff contemplates the construction of any pipe line or feeder for any reservoir or that the said proposed ditch or canal is to be constructed as part of any system of water storage or for the carrying of any other waters than the waters of the Rio Grande as hereinbefore alleged.

V.

Further answering the defendants say that it is probably true that the board of directors of the plaintiff employed a civil engineer as in the seventh paragraph of the complaint alleged but these defendants upon information and belief deny that said engineer was engaged in making any examination or survey for any pipe
24 line or for any other purpose than the location or selection of a route for the proposed ditch or canal as hereinbefore set forth and these defendants on information and belief deny that the

said plaintiff intends in good faith or otherwise to construct the said ditch or canal in any other manner or for any other purpose than for the carrying and diverting of the waters of the Rio Grande as hereinbefore alleged, and these defendants admit that they the said defendants and their associates did hinder and prevent the said civil engineer and other servants of the said plaintiff from entering upon and surveying the lands of these defendants and their associates, as they, the said defendants, are advised they had the lawful right to do, the owners of the said lands not having consented to such entry and survey and such attempted entry and survey over the objections and protest of the owners of said lands being as these defendants are advised unlawful.

VI.

Further answering these defendants admit that they did again on the 17th day of January, 1898, prevent the said civil engineer and other agents and servants of the plaintiff from resuming the said survey and did give out that so often as an attempt was made to resume the same upon the lands of these defendants or any of their associates, they, the said defendants and their associates, would resist and prevent the same, using no more force than might be necessary to prevent the said civil engineer and other servants of the plaintiff from trespassing on the said lands, and these
25 defendants admit that it became impossible for said engineer and other servants of said plaintiff to proceed with the said survey by reason of the resistance of these defendants and their associates, and these defendants, upon information and belief, say that they well know the purpose and object for which said survey was and is attempted to be made and that said purpose and object are as stated in this answer and not otherwise.

VII.

These defendants admit that they or some of them claim to own and do own the land mentioned in the ninth paragraph of the complaint and that they do claim that the plaintiff has no lawful right by its agents or servants to enter thereon for the purpose of making such examination and survey, but these defendants have never admitted that said land will not be damaged or injured in any way, manner or form by entrance thereon by the agents and servants of the plaintiff, but on the contrary thereof these defendants allege that they verily believe their said lands or some of the lands of some of their associates will be greatly injured and damaged by the wrongful acts of the plaintiff's servants and employés, and the said defendants on information and belief allege that the said plaintiff is without visible assets or property of any kind or description and that the said plaintiff could not be compelled by final process to respond in damages for any such injury as might be inflicted by the said plaintiff, for the reason that the said plaintiff is not the owner of any property subject to execution in the Territory of New

Mexico or elsewhere, and its only assets, so far as these defend-
26 ants are informed, consist of stock subscriptions by various persons, some of whom are, as defendants are informed and believe, insolvent, and defendants are further informed and believe that the entire amount of stock subscribed, if paid into the treasury of the plaintiff would be wholly inadequate to construct the ditch or canal proposed to be constructed, and defendants therefore charge on information and belief that said plaintiff, if entitled to exercise the right of eminent domain, is not possessed of capital sufficient to pay for the right of way and construction of such a ditch or canal as it proposes to construct, and defendants are further informed and believe that any such canal or ditch as plaintiff proposes to construct would be wholly useless unless completed for its entire length, and defendants therefore allege that plaintiff is and will be practicably unable to respond in damages for injuries which will be inflicted upon these defendants and their associates by the said plaintiff and its servants, and notwithstanding such inability on the part of said plaintiff, the said plaintiff is proceeding under the cover and protection of the restraining order heretofore granted in this case, to injure and damage the lands of these defendants and their associates before these defendants and their associates can be heard as to their right to resist and prevent such injury. And these defendants deny that their acts if continued would have resulted or will result in irreparable injury to the plaintiff or that the said plaintiff is entitled to the relief prayed for in and by its said complaint or any part of such relief.

27 VIII.

Further answering these defendants allege that they and their associates to the number of many thousand persons and their several ancestors, grantors and predecessors in title have, for long periods of time, extending back in some instances for centuries, and in no instance for a less period than fifty years, used the waters of the Rio Grande for the purpose of irrigating their lands and for their animals and other domestic purposes, and have diverted the same to the extent of the full flow of said waters by means of divers ditches and acequias constructed and maintained by them, and have applied the said waters to the full extent of their flow during the planting and growing season for the irrigation of their lands, so that there is not and has not been for many years during the planting and growing season any surplus water or any more water than was actually and necessarily used by these defendants and their associates in and about the irrigation of their lands and for their live stock and necessary domestic purposes, and that said plaintiff cannot divert any part of the waters of said Rio Grande into its proposed ditch or canal without interfering with the rights of these defendants and their associates, to use the waters of Rio Grande as they and their associates and their ancestors and predecessors in title have been accustomed to use the same for more than fifty years last past, and these defendants upon information and belief aver that it is the purpose and intention of the said plaintiff,

if it succeeds in constructing its said canal or ditch, to divert during
the planting and growing season so much of the waters
28 of said Rio Grande as their said proposed ditch or canal will
carry, and to claim that the same are surplus and unappropriated waters of the said Rio Grande and subject to be diverted by it under the provisions of the law under which the said plaintiff is incorporated; but these defendants aver that there is no surplus of the waters of the Rio Grande which is subject to be appropriated by the plaintiff under the provisions of the said law, but on the contrary thereof the said waters to the full extent of their flow had been appropriated by these defendants and their associates and their ancestors, grantors and predecessors in title for a period of more than fifty years before the incorporation of the said plaintiff, and the right of the said defendants and their associates and their ancestors, grantors and predecessors in title, to so appropriate and use the waters of the Rio Grande to the full extent of their flow as aforesaid had become fixed and vested for a period of more than fifty years before the passage of the law under which the said plaintiff is incorporated.

IX.

Further answering these defendants aver that they are advised by counsel and believe and therefore charge that the said Rio Grande is one of the streams intended to be referred to in section twenty-five of the law under which the plaintiff is incorporated and that the waters thereof are within the restriction contained in said section, that no corporation of any company or companies to supply water for the purposes of irrigation and other purposes, shall have any
right to divert the usual and natural flow of water of any
29 stream for any use whatever between the fifteenth day of
February and the fifteenth day of October of each year unless it be with the unanimous consent of all and every person holding agricultural and cultivated lands under such stream and to be irrigated by the water furnished by said stream and said defendants are advised by counsel and charge that no corporation organized under the provisions of said law can acquire the right to divert the usual and natural flow of waters of the Rio Grande between the fifteenth day of February and the fifteenth day of October in each year without the consent of these defendants and their associates and these defendants aver that the said plaintiff has not obtained and cannot obtain the consent of these defendants and their associates to the diversion of the natural flow of such waters and these defendants further aver that the proposed ditch or canal of the said plaintiff will be a public and private nuisance unless the said plaintiff can acquire the right to divert a portion of the waters of the Rio Grande through the same.

X.

Further answering these defendants aver that they are advised by counsel and believe and therefore charge that by the laws of the Republic of Mexico in force at the time of the acquisition of the

Territory of New Mexico by the United States of America (as well as by the laws of Spain when the present Territory of New Mexico was subject to the dominion of the Spanish crown) the owners of lands adjacent to any stream of water not navigable were permitted to appropriate the waters thereof or so much of said waters as
30 might be necessary for the irrigation of their lands and for their animals and other domestic purposes and by such appropriation of said water the owners of such lands acquired a right to divert the same from their usual and natural course and to apply the same to the irrigation of their lands and for the domestic purposes incident to the cultivation of the soil. And these defendants further aver that their ancestors, grantors and predecessors in title, were owners and proprietors of lands adjacent to the Rio Grande at the time of the acquisition of the Territory of New Mexico by the United States of America and had acquired, prior to such acquisition of the said Territory of the United States, the right to irrigate their lands with the waters of the Rio Grande and had acquired a vested right to use and divert the entire flow of the said waters of the Rio Grande through ditches or acequias constructed and maintained by them for the purpose of irrigating their said lands, nearly all of which lands are now owned by these defendants and their associates and these defendants are advised by counsel and believe and therefore charge that the right to the use of the waters of the Rio Grande so acquired by the ancestors, grantors and predecessors in title, of these defendants, under the laws of Spain or of the Mexican Republic, are appurtenant to the said lands to the irrigation of which the said waters were so applied and as such pass by the conveyance of descent of the said lands and are fully guaranteed and protected by the terms of the treaty between the United States of America and the Republic of Mexico, known as the treaty of Guadalupe Hidalgo, and are not subject to be impaired or
31 divested by any law of the United States or of the Territory of New Mexico and these defendants therefore aver that any law of the Territory of New Mexico which purports in any manner to impair or restrict any of said rights is void and of no effect, and no person or corporation can by virtue of any such pretended law, interfere with the rights of these defendants and their associates, so acquired by their ancestors, grantors and predecessors in title under the laws of Spain and Mexico, as hereinbefore alleged and set forth.

XI.

Further answering these defendants aver that they are advised by counsel, and believe, and therefore charge, that by the laws of the United States in force at the time of the passage of the law under which the plaintiff is incorporated, no title to the waters of any natural stream which is not navigable can be acquired for any purpose whatever, but a right to the use of such waters only, may be acquired for the purpose of irrigating, mining and manufacturing, and these defendants are further advised and believe, and therefore charge, that under the said laws of the United States no person or corporation can acquire any right to divert the natural

flow of the waters of any such stream for the purposes of irrigation except as an incident to the ownership or occupation of lands, and these defendants therefore aver that the said plaintiff, not being the owner or occupier of any of the lands to be irrigated from its said proposed ditch or canal cannot acquire the right to divert any part of the waters of the Rio Grande through its said ditch or canal for the purpose of sale and the corporate powers of the plaintiff under
32 its articles of incorporation, confer upon the plaintiff no right to construct any ditch or canal for the diversion of any part of the waters of the Rio Grande until or unless the said plaintiff has acquired the ownership or occupation of lands to be so irrigated, or has been engaged or employed by persons owning or occupying lands, irrigable from the said ditch or canal to conduct a portion of the waters of said Rio Grande to such lands, and these defendants, on information and belief, aver that the said plaintiff is not the owner or occupier of any such lands, and has no such engagement or employment, nor any purpose or intention to attempt to obtain the same, but on the contrary thereof the said plaintiff intends to rely entirely on its ownership of the said water to be acquired by the construction and maintenance of said ditch or canal and the diversion of the said waters through the same, and will claim the right to sell the said waters to such consumers as will comply with such terms as the said plaintiff shall see proper to fix and impose, and to refuse to deliver water from the said ditch or canal to all persons who fail or refuse to submit to the terms so fixed and imposed by it, and on information and belief these defendants aver that the said plaintiff seeks and intends to monopolize and control, so far as it can do so, the supply of water available for the purposes of irrigation of the lands along the route of its said proposed ditch or canal for pecuniary profit and speculation only, and these defendants, on information and belief, further aver that it is not the purpose or intention of the said plaintiff to apply any portion of the waters so intended to be diverted by it to any other use
33 or purpose than to sell the same for pecuniary profit and speculation as aforesaid.

XII.

Having fully answered the complaint of the plaintiff the said defendants by way of cross-complaint against the plaintiff and as ground for affirmative relief against the said plaintiff alleges.

I.

That these defendants and cross-plaintiffs and their associates to the number of many thousands of persons including the owners of many ditches or acequias who are by the laws of the Territory of New Mexico empowered as bodies corporate to sue and be sued, the associates of these defendants and cross-plaintiffs being so numerous as to render it impracticable to bring all before the court, are the owners of lands which for centuries have been irrigated from the waters of the Rio Grande and for the irrigation of which during the planting and growing season of each year the entire flow of the

waters of said Rio Grande are necessary for the nourishment of the crops of grain, beans, chili, grapes, fruits and other products of the soil which they and their associates and their ancestors, grantors and perdecessors in title, have been accustomed from time immemorial to grow upon the said lands and without which said waters for such purposes of irrigation agriculture is impossible in the valley of the Rio Grande where the said lands are situated.

II.

34 That the plaintiff and cross-defendant, The Albuquerque Land and Irrigation Company, is *a*t corporation created, organized and existing under the laws of the Territory of New Mexico and having its principal office and place of business at Albuquerque, in the county of Bernalillo, in said Territory.

III.

That the said plaintiff and cross-defendant is proposing to construct a canal or ditch beginning at a point on the east bank of the Rio Grande south of and near the Indian pueblo of San Felipe in the county of Bernalillo and Territory of New Mexico and the terminus of said main line shall be at a point to the south near the railway bridge of the Atchison, Topeka and Santa Fé railway, at Isleta, also in said county of Bernadillo. The general course and direction of said main line shall be southerly, east of the east bank of said river along and under the foot-hills through the city of Albuquerque and the length thereof shall be thirty-five miles, more or less, for the purpose of diverting what it claims to be the surplus waters of the Rio Grande through its said canal or ditch for the purpose of selling the same for pecuniary profit and speculation and not for the purpose of applying any of said waters to the irrigation of any lands owned or occupied by it.

IV.

Defendants and cross-complainants are informed and believe and therefore charge that the said plaintiff and cross-defendant is not
35 the owner or occupier of any lands which can be irrigated with water conducted through the said proposed canal or ditch nor is it the owner of any reservoir site or reservoir or other means or appliance for the storage of water for the supply of its said proposed canal or ditch nor is it the owner of any water right or of any water with which it may conduct the business for which it purports to be organized, but on the *the* contrary thereof the said plaintiff and cross-defendant will as they are informed and verily believe rely solely and entirely upon such ownership of the waters of the Rio Grande as it can acquire by the construction and maint*a*inance of its proposed ditch or canal and the diversion of such waters by means thereof and will claim the right to sell and dispose of such water to such persons as will submit to and comply with the terms to be fixed and imposed by it and for such purposes as the consumers and users of said water shall see fit to apply the same, and will refuse and decline to permit any person to take any water

whatever from its said propose- ditch or canal without the payment of such charges and the compliance with such terms as it shall so impose and will claim to be the exclusive owner of so much of the waters of the Rio Grande as shall be diverted through and by means of its said proposed ditch or canal with the right to vend and sell the same for pecuniary profit and speculation.

V.

These defendants and cross-plaintiffs further aver that they and their associates to the number of many thousand persons and their several ancestors, grantors and predecessors in title, for long
36 periods of time extending back in some instances for centuries and in no instance for less than fifty years used the waters of the Rio Grande for the purpose of irrigating their lands and for their animals and other domestic purposes and have diverted the same to the extent of the full flow of said waters by means of divers ditches and acequias constructed and maintained by them and have applied the said waters to the full extent of their flow during the planting and growing season to the irrigation of their lands so that there is not and has not been for many years during the planting and growing season any surplus water or any more water than was actually and necessarily used by these defendants and cross-plaintiffs and their associates in and about the irrigation of their lands and their live stock and other domestic purposes and that said plaintiff and cross-defendant cannot divert any part of the waters of the said Rio Grande into its proposed ditch or canal without interfering with the rights of these defendants and cross-plaintiffs to use the said waters of the Rio Grande as they and their associates and several ancestors, grantors and predecessors in title, have been accustomed to use the same for more than fifty years last past and these defendants and cross-plaintiffs upon information and belief, aver that it is the purpose and intention of the said plaintiff and cross-defendant if it succeeds in constructing its said canal or ditch to divert, during the planting and growing season, so much of the waters of the Rio Grande as their said proposed canal or ditch will carry and to claim that the same are the surplus and unappropriated waters of the said Rio Grande and subject to be diverted by it under the
37 provision of the law under which it is incorporated, but these defendants and cross-plaintiffs aver that there is no surplus of the waters of the Rio Grande which is subject to be appropriated by the plaintiff and cross-defendant under the provisions of the said law, but on the contrary thereof the said waters to the full extent of their flow had been appropriated by these defendants and cross-plaintiffs and their associates and their several ancestors, grantors and predecessors in title, for a period of more than fifty years before the incorporation of the said plaintiff and cross-defendant, and the right of the said defendant and cross-plaintiffs and their associates and their several ancestors, grantors and predecessors in title, to so appropriate and use the waters of the Rio Grande to the full extent of their flow as aforesaid had become fixed and vested for a period

of more than fifty years before the passage of the law under which the said plaintiff and cross-defendant is incorporated.

VI.

These defendants and cross-plaintiffs further aver that they are advised by counsel and believe and therefore charge that the said Rio Grande is one of the streams intended to be referred to in section twenty-five of the law under which the plaintiff and cross-defendant is incorporated and that the waters thereof are within the restriction contained in said section, that no incorporation of any company or companies to supply water for the purpose of irrigation and other purposes, shall have any right to divert the usual and natural flow of water of any such stream for any use whatever between the fifteenth day of February and the fifteenth day of
38 October of each year, unless it be with the unanimous consent of all and every person holding agricultural and cultivated lands under such stream and to be irrigated by the water furnished by said stream and said defendants and cross-plaintiffs are advised by counsel and charge that no corporation organized under the provisions of said law can acquire the right to divert the usual and natural flow of the waters of the Rio Grande between the fifteenth day of February and the fifteenth day of October in each year, without the consent of these defendants and cross-plaintiffs and their associates and these defendants and cross-plaintiffs aver that the said plaintiff and cross-defendant has not obtained and cannot obtain the consent of these defendants and cross-plaintiffs and their associates to the diversion of the natural flow of such waters and these defendants and cross-plaintiffs further aver that the proposed ditch or canal of the said plaintiff and cross-defendant will be a public and private nuisance unless the said plaintiff and cross-defendant can acquire the right to divert a portion of the waters of the Rio Grande through the same.

VII.

The defendants and cross-plaintiffs further aver that they are advised by counsel and believe and therefore charge that by the laws of the Republic of Mexico in force at the time of the acquisition of the Territory of New Mexico by the United States of America (as well as by the laws of Spain when the present Territory of New Mexico was subject to the dominion of the Spanish Crown) the owners of lands adjacent to any stream of water not navigable
39 were permitted to appropriate the waters thereof or so much of said waters as might be necessary for the irrigation of their lands and for their animals and other domestic purposes and by such appropriation of said waters the owners of such lands acquired a right to divert the same from their usual and natural course and to apply the same to the irrigation of their lands and for the domestic purposes incident to the cultivation of the soil. And these defendants and cross-plaintiffs further aver that their ancestors, grantors and predecessors in title, were owners and proprietors of

lands adjacent to the Rio Grande at the time of the acquisition of the Territory of New Mexico by the United States of America and had acquired, prior to such acquisition of the said Territory by the United States, the right to irrigate their lands with the waters of the Rio Grande and had acquired a vested right to use and divert the entire flow of the said waters of the Rio Grande through ditches and acequias constructed and maintained by them for the purpose of irrigating their said lands nearly all of which lands are now owned by these defendants and cross-plaintiffs and their associates, and these defendants and cross-plaintiffs are advised by counsel and believe and therefore charge that the right to the use of the waters of the Rio Grande so acquired by the ancestors, grantors and predecessors in title of these defendants and cross-plaintiffs under the laws of Spain or of the Mexican Republic, are appurtenant to the said lands to the irrigation of which the said waters were so applied and, as such, pass by the conveyance or descent of the said lands and are fully guaranteed and protected by the terms of the treaty
40 between the United States of America and the Republic of Mexico, known as the treaty of Guadalupe Hidalgo, and are not subject to be impaired or divested by any law of the United States or of the Territory of New Mexico and these defendants and cross-plaintiffs therefore aver that any law of the Territory of New Mexico which purports in any manner to impair or restrict any of said rights is void and of no effect, and no person or corporation can by virtue of any such pretended law interfere with the rights of these defendants and cross-plaintiffs and their associates so acquired by their respective ancestors, grantors and predecessors in title, under the laws of Spain and Mexico as hereinbefore alleged and set forth.

VIII.

These defendants and cross-plaintiffs further aver that they are advised by counsel and believe and therefore charge that by the laws of the United States, in force at the time of the passage of the law under which the plaintiff and cross-defendant is incorporated no title to the waters of any natural stream which is not navigable can be acquired for any purpose whatever, but a right to the use of such waters only, may be acquired for the purposes of irrigation, mining and manufacturing, and these defendants and cross-plaintiffs are further advised and believe and therefore charge that under the said laws of the United States no person or corporation can acquire any right to divert the natural flow of the waters of any such stream for the purposes of irrigation except as an incident to the owner-
41 ship or occupation of lands, and these defendants and cross-plaintiffs therefore aver that the said plaintiff and cross-defendant not being the owner of any lands to be irrigated from its said proposed ditch or canal, cannot acquire the right to divert any part of the waters of the Rio Grande through its said ditch or canal, for the purpose of sale, and the corporate powers of the plaintiff and cross-defendant, under its articles of incorporation, confer upon the plaintiff and cross-defendant no right to construct any ditch or canal for the diversion of any part of the waters of the Rio

Grande until or unless the said plaintiff and cross-defendant has acquired the ownership or occupation of lands to be so irrigated or has been engaged or employed by persons owning and occupying lands, irrigable from said ditch or canal, to conduct a portion of the waters of said Rio Grande to such lands, and these defendants and cross-plaintiffs on information and belief aver that the said plaintiff and cross-defendant is not the owner or occupier of any such lands, and has no such engagement or employment nor any purpose or intention to attempt to obtain the same; but on the contrary thereof the said plaintiff and cross-defendant intends to rely entirely on its ownership of the said water to be acquired by the construction and maintenance of said ditch or canal, and the diversion of the said water through the same, and will claim the right to sell the said waters to such consumers as will comply with such terms as the said plaintiff and cross-defendant shall see proper to fix and impose, and to refuse to deliver water from the said ditch or canal to all persons who fail or refuse to submit to the terms so fixed and imposed by it, and on information and belief these de-
42 fendants and cross-plaintiffs aver that the said plaintiff and cross-defendant seeks and intends to monopolize and control, so far as it can do so, the supply of water available for the purposes of irrigation of the lands along the route of its said proposed ditch or canal for pecuniary profit and speculation only, and these defendants and cross-plaintiffs, on information and belief, further aver that it is not the purpose or intention of the said plaintiff and cross-defendant to apply any portion of the waters so intended to be diverted by it to any other use or purpose than to sell the same for pecuniary profit and speculation as aforesaid.

IX.

These defendants and cross-plaintiffs are advised by counsel and believe and therefore charge that the said plaintiff and cross-defendant, although incorporated under the laws of the Territory of New Mexico, as in said complaint alleged, for the reasons hereinbefore stated and alleged, is not authorized by law to exercise the right of eminent domain or to enter upon the lands of any person or persons within this Territory for the purpose of making any examination or survey thereof, without the consent of the owner or owners of such lands, nor is the said plaintiff and cross-defendant authorized to build or construct its proposed ditch or canal for the purpose for which the same is intended to be built, but all of the acts and proceedings of said plaintiff and cross-defendant done and sought and attempted to be done are in violation of the legal and equitable rights of these defendants and cross-plaintiffs. Wherefore the said defendants and cross-plaintiffs pray that the said plaintiff and cross-defendant may be by the order
43 and decree of this honorable court restrained and enjoined from entering upon or attempting to enter upon the land of these defendants and cross-plaintiffs or their associates for the purpose of making any examination or survey thereof, for the purpose of locating the route of the said proposed canal or ditch, and from

exercising or attempting to exercise the right of eminent domain in order to secure the right of way for said proposed canal or ditch and from diverting or attempting to divert through or by means of its said proposed canal or ditch any of the waters of the Rio Grande, and from interfering in any manner with the use, by these defendants and cross-plaintiffs and their associates, of the said waters of the Rio Grande in the manner and to the extent that these defendants and cross-plaintiffs and their associates and their several ancestors, grantors and predecessors in title, have been accustomed to use the said waters until the further order of this court, and that on final hearing the said injunction may be made perpetual, and that these defendants and cross-plaintiffs may have such other and further relief as may be proper in the premises.

NEILL B. FIELD,
Attorney for Defendant.

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

Tomas C. Gutierrez, Pedro Griego y Apodaca, Jesus Samora, Benito Jaramillo, Leon Montoya, being duly sworn, each for himself and not one for the other, on his oath deposes and says that he has heard read the foregoing answer and cross-complaint and knows the contents thereof and that the allegations therein contained are true of his own knowledge except as to those matters which are stated on information and belief, and as to such matters he believes the same to be true.

TOMAS C. GUTIERREZ.
JESUS A. SAMORA.
PEDRO GRIEGO Y APODACA.
BENITO his x mark. JARAMILLO.
LEON his x mark. MONTOYA.

Subscribed and sworn to before me by Tomas C. Gutierrez, Pedro Griego y Apodaca, Jesus Samora, Benito Jaramillo and Leon Montoya, this 22d day of January, 1898.

[SEAL.]

HARRY F. LEE,
Notary Public.

And afterwards, to wit, on the day and year last aforesaid, there was also filed in the office of the clerk of the district court within and for the county of Santa Fé, accompanying said transcript of record entries, hereinbefore set out, from the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, the answer of the said plaintiff to the new matter contained in the answer of the said defendants, which said answer is in words and figures following, to wit:

ALBUQUERQUE LAND & IRRIGATION COMPANY, Plaintiff,
vs.
TOMAS C. GUITERREZ ET AL., Defendants.

45 *The Answer of the said Plaintiff to the New Matter Contained in the Answer of the said Defendants to the Complaint in this Cause.*

Plaintiff denies that all of the water of the said Rio Grande river has been appropriated, as alleged in the new matter in said answer, and further denies that there is no surplus water in the said Rio Grande which can or may be taken and used by the plaintiff.

Plaintiff further says that the water taken for use by the system of community ditches, from the operation and conduct of which defendants and their associates have or may have been using the same, has been properly used, but on the contrary thereof that the same has been taken in wasteful quantities, unreasonably used and after use the same has not been returned to the channel from which it was diverted, and that by reason of said unreasonable use and by not returning the same to said Rio Grande, a great per cent. thereof has been wasted, to wit: more than fifty per cent. of the amount actually diverted from said river; and that were said water reasonably used and returned to the river from whence diverted, the surplus which now remains over and above the said taking and use would be far more than plaintiff is seeking to appropriate by the taking out of its said ditch.

Plaintiff further says that the supply of water, between the 15th day of February and the 15th day of October, is in many years more than sufficient for defendants and their supposed associates, and in every year on days other than between the said 15th
46 day of February and the 15th day of October, vast quantities of said water may be stored in reservoirs, and if necessary hereafter for the supplying of its customers and patrons applying water to a beneficial use for said reservoirs to be constructed it is the intention of the plaintiff to construct such reservoirs.

Plaintiff further alleges that between the 15th day of October and the 15th day of February, in each and every year, all the water flowing through the channel of said river is unappropriated and not used by anybody, which said water so going to waste the said plaintiff proposes if necessary to the carrying on of its business to divert by means of the proposed canal and pipe lines and reservoirs, thereby storing the same for use of its patrons and the public in general who may see fit to take water from said plaintiff.

Plaintiff further answering, denies that it proposes to divert and appropriate water out of said river purely for speculative purposes, and alleges the fact to be that it is a public corporation incorporated for the purpose of supplying water for the general use of such owners of irrigable lands as see fit to patronize it, and that such appropriation is under the law a beneficial use.

Plaintiff further alleges that the owners of at least 850 acres of land, now irrigating by water taken from said river, and who have

an absolute right to take water from said river as appertaining to said land, have entered into contracts with the promoters and organizers of the plaintiff company to take water for the irrigation of their lands from said company so soon as its said ditch shall be constructed; and plaintiff further alleges that it is the
47 beneficial owner of said contracts and that the said promoters, with whom said contracts were made, have agreed to assign and set over said contracts to said plaintiff whenever said plaintiff company demands the assignment of the same; and plaintiff further alleges that many other persons, owners of lands now irrigated by water taken from said river, are ready and willing and offer to take water from said company out of its said ditch when constructed for the purpose of irrigating the lands now being cultivated by them.

Plaintiff further alleges that said company was organized not for speculative purposes but for the purpose of developing and conserving the water now going to waste through the channel of said river, and not for the purpose of gain and speculation, and with no intention to interfere with the vested rights of any person or persons or ditch company whatsoever who may have any prior right to the water in said river; it being the purpose and object of said plaintiff to promote the development and prosperity of the country through which said ditch is to run, and that the sole advantage that the organizers and subscribers to the stock of said company expect to gain is the increase in the general value of the property which they may own in the community in which they reside.

And plaintiff by filing this answer does not waive the benefit of a demurrer to the answer of defendants and the cross-complaint filed by them, but expressly claims the same benefit thereof as if it had expressly demurred thereto.

48 *The Answer of the Plaintiff and Cross-defendant to the Cross-complaint of the Defendants.*

I.

Plaintiff and cross-defendant denies that the defendants and cross-plaintiffs have any right to appear or defend for their associates, numbering many thousands, or for and on behalf of community, ditches or acequias, which, by the act of the Legislative Assembly of the Territory of New Mexico, approved February 28, 1895, were created bodies corporate; and denies that the entire flow of the waters of the Rio Grande are necessary for the irrigation of the land owned by them and for the nourishment of the crops of grain, beans, chili, grapes, fruits and other products of the soil, as alleged in paragraph I of said cross-complaint.

II.

Plaintiff and cross-defendant admits that it is a corporation created, organized and existing under the laws of the Territory of New Mexico, with its principal place of business at Albuquerque in the county of Bernalillo, in said Territory.

III.

Plaintiff and cross-defendant admits that it is proposing to construct a canal or ditch as alleged in paragraph III of the cross-complaint, but denies that the objects of its incorporation and the taking of waters and supplying of the same to owners of land, are for pecuniary profit and speculation and not for the purpose of applying any of said waters to the irrigation of any lands owned or occupied by it.

49

IV.

Plaintiff and cross-defendant denies that it is not the owner or occupier of any lands which can be irrigated with water conducted through its proposed canal or ditch, and denies that it is not the owner of any water right or of any water with which it may conduct the business for which it was organized; and denies that it intends to solely and entirely rely upon such ownership of the waters of the Rio Grande as it can acquire by the construction and maintenance of its proposed canal or ditch, and its diversion of such waters by means thereof; but alleges that the owners of at least eight hundred and fifty acres of land now irrigated by water taken from said river and who have had the absolute right to take water from such river as appurtenant to said land, have entered into contracts with the promoters and organizers of the plaintiff company to take water for the irrigation of their lands from said company so soon as its said ditch shall be constructed. And plaintiff and cross-defendant further answering, alleges that it is the beneficial owner of said contracts and that the promoters with whom said contracts were made have agreed to assign and set over same to the plaintiff and cross-defendant whenever it demands the assignment of the same; and plaintiff and cross-defendant further alleges that many other persons, owners of lands now irrigated by water taken from said river, are ready and willing and offer to take water from said company out of said ditch when it is constructed, for the purpose of irrigating lands now being cultivated by them. And further answering,
50 alleges that the said company was organized not for speculative purposes, but for the purpose of developing and conserving the water now going to waste through the channel of said river, and not for the purpose of gain and speculation; and denies that it will dispose of any water which may pass through its proposed canal or ditch to consumers to be used for any purpose they may see fit to apply the same; and on the contrary, alleges, that the objects and purposes of the corporation are for the purpose of irrigation and improvement and colonization of lands; and denies that it proposes to divert and appropriate water out of said river purely for speculation; and alleges that it is a public incorporation, incorporated for the purpose of supplying water and for the general use of such owners of irrigable lands as see fit to patronize it, and that such appropriation is under the law of beneficial use.

V.

Plaintiff and cross-defendant denies that the said defendants and cross-plaintiffs have any right to interpose a defense for any of their associates who are not parties to this suit, or for and on behalf of any ditches or acequias, which, by the laws of the Territory of New Mexico, are bodies corporate; and denies that said parties have for centuries, and in no instance for less than fifty years, diverted all the waters of said Rio Grande by means of divers ditches and acequias constructed and maintained by them, and applied it as aforesaid to its full extent as in paragraph V of said cross-complaint alleges; and further answering, plaintiff and cross-defendant alleges that the
51 water taken by the defendants and cross-plaintiffs for use by system of community ditches, has been improperly used, and that the same has been taken in wasteful quantities, unreasonably used and after user, the same has not been returned to the channel from which it was diverted, and that by reason of such unreasonable use and by not returning the same to the said Rio Grande, a great per cent. thereof has been wasted, to wit: fifty per cent. of the amount actually diverted from said river, and if said waters were reasonably used and retured to the river from whence diverted, the surplus which now remains over and above the said taking and user would be far more than plaintiff is seeking to appropriate by taking out of its said ditch. Further answering, plaintiff and cross-defendant alleges that there is at all times of the year a surplus of water over and above what is used by the defendants and cross-plaintiffs for any beneficial use by any of them or for the purpose of irrigating their lands or watering their live stock and for other domestic purposes, or any other purpose for which they might have a right to use the same.

VI.

Plaintiff and cross-defendant further answering, alleges that it is advised and believes that the construction placed upon section 25 of the law under which the plaintiff company is incorporated, as alleged by the defendants in paragraph VI. of the cross-complaint, is incorrect; and that the Rio Grande is not such a stream as is referred to in said section, whereby companies formed under
52 said act are prevented from diverting the usual and natural flow of water for any use whatever, between the 15th of February and the 15th of October, of each year, without the unanimous consent of all and every person holding agricultural and cultivated lands under such stream and to be irrigated by the waters furnished by such stream; and plaintiff and cross-defendant further answering, denies that the ditch or canal which it is proposed to construct, will be a public or private nuisance unless it can acquire a right to divert a portion of the waters of the Rio Grande through the same.

VII.

Plaintiff and cross-defendant further answering, upon information and belief and advice of counsel, denies that the defendants and cross-plaintiffs under and by virtue of the laws of the Republic

of Mexico, in force at the time of the acquisition of the Territory of New Mexico, by the United States of America, or their ancestors, grantors, and predecessors in title, have acquired a vested right to use and divert the entire flow of the waters of the Rio Grande through ditches and acquias constructed and maintained by them, for the purpose of irrigating their lands as alleged and set forth in paragraph VII of said cross-complaint; and deny that the right to the use of the waters of the Rio Grande so alleged to have been acquired by the defendants and cross-plaintiffs and their ancestors, grantors and predecessors in title, under the laws of Spain or of the Mexican Republic, are protection to said lands to the irrigation of which the said waters were so applied, and as such passed by the con-
53 veyance or descent of the said lands; and deny that the same are fully guaranteed and protected by the terms of the treaty between the United States of America and the Republic of Mexico, known as the treaty of Guadaloupe Hidalgo; and deny that the same are not subject to be impaired or divested by the laws of the United States or of the Territory of New Mexico.

VIII.

Further answering, plaintiff and cross-defendant, denies that under the laws of the United States in force at the time of the passage of the law under which this plaintiff and cross-defendant is incorporated, no person or corporation could acquire any right to divert the natural flow of the water of any such stream for the purpose of irrigation, except as is incident to the ownership or occupation of lands, if by said averment, it is intended to charge that the person or corporation diverting water must be the owner or occupant of the land; and denies that it has not the right to divert any part of the water of the Rio Grande through its said ditch or canal; and denies that it has no right to construct any ditch or canal for the diversion of any part of the waters of the Rio Grande until it has acquired the ownership or occupation of lands to be so irrigated, or has been engaged or employed by persons owning or occupying lands irrigable from said water from said ditch or canal to conduct a part of the water of the Rio Grande to such lands; and plaintiff and cross-defendant alleges, as it has hereinbefore stated, that it has made contracts with numerous persons to furnish them water,
54 whose lands are adjacent to and irrigable and have been irrigated by waters taken from the said Rio Grande by community ditches and otherwise; and denies that it intends to rely entirely upon its ownership of the said water to be acquired by the construction and maintenance of its said ditch and canal; and denies, as hereinbefore denied, that said ditch is being constructed for speculative purposes; and plaintiff and cross-defendant further answering, alleges that under and by virtue of the powers conferred upon it by the act under which it is created, it has the right to construct and maintain reservoirs for the purpose of storing water to be conducted through its said ditches and canals for the purpose of irrigating lands, as well as the right which it claims to take water from the said Rio Grande.

IX.

Plaintiff and cross-defendant further answering, denies that under and by virtue of the laws of New Mexico under which it is created, it has no right to exercise the right of eminent domain or to enter upon the lands of any person or persons in this Territory for the purpose of making any examination or survey thereof, without the consent of the owner or owners of such land; and denies that it is not authorized to construct its proposed ditch or canal for the purpose for which it is intended to be built; and denies that any of its objects done and sought or attempted to be done are in violation of the legal and equitable rights of said defendants and cross-plaintiffs; and plaintiff and cross-defendant denies that the defendants and
55 cross-plaintiffs are entitled to an injunction enjoining and restraining it from entering upon, or attempting to enter upon the lands of the said defendants or their associates for the purpose of making an examination and survey thereof, for the purpose of locating the route of its proposed ditch, canal or pipe line, or from exercising any rights of eminent domain in order to carry out the objects of its incorporation.

CHILDERS & DOBSON,
COLLIER & MARRON,
Attorneys for Plaintiffs.

TERRITORY OF NEW MEXICO, }
County of Bernalillo, } *ss*:

C P. Stamem, being duly sworn, upon oath deposes and says that he is a director and agent of the plaintiff and cross-defendant for the purpose of making this affidavit; that he has read the foregoing answer and knows the contents thereof, and that the same are true except as to those matters stated on information and belief, and as to those matters, he believes them to be true.

(Signed) C. P. STAMEM.

Subscribed and sworn to before me this 11th day of March, 1898.

S. GRUNSFELD,
[NOTARIAL SEAL.] *Notary Public.*

And thereafter, to wit, on the day and year last aforesaid, there was filed in the office of the said clerk of the district court within and for the county of Santa Fé, accompanying said transcript
56 of record entries hereinbefore set out from the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, the reply of cross-plaintiff to new matter contained in the answer of the cross-defendant, which said reply is in words and figures following, to wit:

TERRITORY OF NEW MEXICO:

Bernalillo District Court.

ALBUQUERQUE LAND AND IRRIGATION CO., Plaintiffs,
vs.
TOMAS C. GUTIERREZ ET AL., Defendants. } No. 4956.

and

TOMAS C. GUTIERREZ ET AL., Cross-plaintiffs,
vs.
ALBUQUERQUE LAND AND IRRIGATION CO., Cross-defendants.

Reply of Cross-plaintiff to New Matter Contained in the Answer of Cross-defendant, The Albuquerque Land and Irrigation Company to the Cross-complaint.

I.

Cross-plaintiffs on information and belief deny that the owners of at least eight hundred and fifty acres of land now irrigated by water from said river, who have the absolute right to take water from said river as appurtenant to said land, have entered into contracts with the promoters and organizers of the cross-defendant company to take water for the irrigation of their lands so soon as its said
57 ditch shall be constructed, or that the said cross-defendant company is the beneficial owner of said contracts, and the said cross-plaintiffs on information and belief, also deny that any other persons, owners of lands now irrigated by water taken from said river, are ready or willing or offer to take water from said company out of the said ditch of the cross-defendants, when constructed, for the purpose of irrigating lands now being cultivated by them.

II.

Cross-plaintiffs further deny that water taken by cross-plaintiffs and their associates for use by their systems of community ditches has been improperly used, or that the same has been taken in wasteful quantities; or that the same has been used unreasonably; or that the same has not been returned to the channel of the river from which it was diverted, after use, or that by reason of said unreasonable use, or by not returning same to said Rio Grande, a great per cent. thereof has been wasted, to wit, fifty per cent., or any other portion of the amount actually diverted from said river. And said cross-plaintiffs further deny that if said waters were reasonably used and returned to the river from whence diverted, any surplus would remain over and above the said amount taken, required and used by these cross-plaintiffs and their associates. And these cross-plaintiffs further deny that there is at all times of the year a surplus of water over and above what is used by these cross-plaintiffs and their associates for bene-

ficial purposes and for irrigating their lands and watering their live stock, and for other domestic purposes.

58 Where*of*, the cross-plaintiffs pray as in their cross-complaint.

NEILL B. FIELD,
Attorney for Cross-plaintiff.

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

Tomas C. Gutierrez being first duly sworn, upon his oath deposes and says that he has read the foregoing reply, and knows the contents thereof, and that the allegations therein contained are true, except as to those matters stated upon information and belief, and as to those matters, he believes them to be true.

T. C. GUTIERREZ.

Subscribed and sworn to before me by Tomas C. Gutierrez, this 14th day of March, 1898.

[SEAL.] HARRY F. LEE,
Notary Public.

And afterwards, to wit, on the day and year last aforesaid, there was also filed in the office of the clerk of the district court within and for the county of Santa Fé, accompanying said transcript of record entries, hereinbefore set out, from the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, a writ of injunction, which said writ is in words and figures following, to wit:

ALBUQUERQUE LAND AND IRRIGATION CO. }
vs.
T. C. GUTIERREZ ET AL. }

To Tomas C. Gutierrez, Pedro Griego y Apodaca, Jesus
59 Samora, Benito Jaramillo, Leon Montoya, their agents, confederates, and assistants:

You and each of you are hereby commanded, ordered and enjoined that you do henceforth refrain, desist and cease from hindering, preventing, obstructing and delaying the plaintiff, The Albuquerque Land and Irrigation Company, its agents, servants and employés from proceeding with the examination and survey by obstructing, preventing and hindering their entrance upon and along lands lying and being at, near and along a proposed, route for a canal, ditch and pipe line beginning at a point on the east bank of the Rio Grande south or near the Indian pueblo of San Felipe in the county of Bernalillo and Territory of New Mexico, and the terminus of said main line to be at a point south near the railway bridge of the Atchison, Topeka and Santa Fe Railway at Isleta also in said county of Bernalillo. The general course and direction of said main line being southerly, east of the east bank of the said river along and under the foot-hills through the city of Albuquerque and the length thereof estimated to be thirty-five miles, more or less, or

otherwise, until the further order of this court; and that you show cause, if any you have, before the judge of the district court of the second judicial district within and for the county of Bernalillo at the court-house in Albuquerque on the 25th day of January, 1898, at ten o'clock in the forenoon, why said injunction should not be continued, and this do you under penalty of the law.

60 Witness the Honorable Jonathan W. Crumpacker, associate justice of the supreme court, of the Territory of New [SEAL.] Mexico, and judge of the second judicial district court thereof, and the seal of said district court, this 17th day of January, A. D. 1898.

HARRY P. OWEN, *Clerk.*

Which said writ of injunction is endorsed:

I, sheriff of Bernalillo county, New Mexico, certify that I have served this order on the within-named Tomas C. Gutierrez, Pedro Griego y Apodaca, Jesus Samora, Benito Jaramillo and Leon Montoya, on the 17th day of January, 1898, at said county of Bernalillo, by then and there delivering a true copy of the same to each of the above-named parties.

T. S. HUBBELL,
Sheriff of Bernalillo Co., N. M.

Fees:

Services	$5.00
Mileage, 12 miles	1.50
Return	.50
	7.00

And afterwards, to wit, on the 4th day of June, A. D. 1898, there was filed and entered of record in the office of the clerk of the district court of the first judicial district, *as* the Territory of New Mexico, within and for the county of Santa Fé, an order setting the time for the hearing of said cause, which said order is in words and figures following, to wit:

In the District Court of the First Judicial District of the Territory of New Mexico, County of Santa Fé.

61 THE ALBUQUERQUE LAND AND IMPROVEMENT Company *vs.* T. C. GUTIERREZ ET AL. } No. 3956.

Upon motion of the attorney for the plaintiff, it is hereby ordered that said cause be set down for trial on Tuesday, the 14th of June, A. D. 1898.

JOHN R. McFIE,
Associate Justice, &c.

And thereafter, to wit, on the 20th day of September, A. D. 1898, there was filed and entered of record in the office of the clerk of the district court, of the first judicial district, of the Territory of New Mexico, within and for the county of Santa Fé, an order for the continuance of said cause, which said order is in words and figures following to wit:

TERRITORY OF NEW MEXICO,
County of Santa Fé.

ALBUQUERQUE LAND AND IRRIGATION COMPANY
vs.
TOMAS C. GUTIERREZ ET AL. } No. 3956.

This cause coming on to be heard, by consent of counsel said cause is hereby continued until the 17th day of October, 1898.

JOHN R. McFIE, *Judge.*

And afterwards, to wit, on the 7th day of October, A. D. 1899, the same being the thirtieth day of a regular term of the district court, of the first judicial district, of the Territory of New Mexico, within and for the county of Santa Fé, the following final decree in the above-entitled cause was had and entered of record, among
62 other proceedings, which said final decree is in words and figures following, to wit:

In the District Court of the First Judicial District of the Territory of New Mexico within and for the County of Santa Fé.

THE ALBUQUERQUE LAND AND IRRIGATION COMPANY,
Plaintiff,
vs.
TOMAS C. GUTIERREZ ET AL., Defendants. } 3956.

and

TOMAS C. GUTIERREZ ET AL., Cross-complainants,
vs.
THE ALBUQUERQUE LAND AND IRRIGATION COMPANY, Cross-defendants.

Judgment.

This cause coming on to be heard upon the complaint of the plaintiff, the answer of the defendants thereto, the cross-complaint of the defendants and the replications of the defendants to the answer and cross-complaint, and the respective parties having appeared by their counsel, N. C. Collier and W. B. Childers, Esqs., on behalf of the plaintiff, and Neill B. Field, Esq., on behalf of the defendants, and said cause having been tried before the court, and argued by counsel for the respective parties, the court having heard the evidence and taken said cause under advisement, after a full consideration thereof, doth find as matters of fact:

I.

That the plaintiff is a corporation and has complied with the provisions of the laws of the Territory of New Mexico. It is organized for the purpose of constructing a canal from a point on
63 the Rio Grande about twenty-eight miles above the city of Albuquerque to the railroad bridge across said Rio Grande, at Isleta, the initial and terminal points of said canal being within the county of Bernalillo.

II.

That the headgate of plaintiff's proposed canal is to be at a point on the Rio Grande three-eighths (⅜) of a mile below or south of the Indian village of San Felipe, about twenty-eight miles above the city of Albuquerque, that the ultimate terminus or point of discharge into the river is at the railroad bridge near Isleta, the entire length of the canal to be about thirty-five (35) miles. The present proposed terminus is at the city of Albuquerque.

III.

That the engineer of the company was proceeding with a survey of the line between Albuquerque and the headgate, when defendants interfered with and obstructed the said engineer in the making of said survey.

IV.

That the capacity of the said proposed canal is two hundred and ten (210) cubic feet of water per second.

V.

That there are at present thirteen ditches taking water from the river between the proposed headgate of plaintiff's canal and Albuquerque, and seven between Albuquerque and the Indian town of Isleta.

VI.

64 That the aggregate capacity of all of the said old ditches is four hundred and ninety-eight (498) cubic feet per second, and the court finds that there has been a valid prior appropriation by the owners of said old ditches of the said four hundred and ninety-eight (498) feet per second of water.

VII.

That during a few months or parts of the summer months of the years 1894, 1895, 1896 and 1897, there was no surplus water flowing in the river at the proposed headgate, but during a large majority of the months of each of these years there was a large amount of surplus water flowing past that point, and that those years were the only years within ten or twenty years in which the river was dry at or above Albuquerque.

VIII.

That in a majority of the last ten years there has been surplus water flowing in the said river at the proposed headgate at all times.

IX.

That the river became dry at Albuquerque about the last of June, 1894, and remained so for twenty-two days, and also in June, 1896, for a number of days, the court being unable to find the exact number or length of time from the evidence.

X.

That the months of June, July, August and September are the "dry season."

XI.

That the planting and growing season in the Rio Grande valley begins in February and ends with October.

65 XII.

That very few farmers served by the present ditches sow wheat, oats, barley or rye, in the fall of *of* the year but do so in the spring, beginning during February or March and that very little, if any, of the water now appropriated is used for these crops after June 15th, but the water is used for chili, corn, alfalfa and melons after that time and for alfalfa as late as October.

XIII.

That for all the months in most years and for most of the months in every year there is a surplus of water flowing in the Rio Grande over and above the amount appropriated by said old ditches.

XIV.

The court finds that there is no evidence that plaintiff relies on any source of water supply than the Rio Grande or that the proposed canal of plaintiff is expected or intended to receive and distribute stored waters.

XV.

That the plaintiff is not the owner of any lands along the line of its proposed canal or elsewhere.

XVI.

That there is no evidence that plaintiff has any contract with or employment by any person who is the owner of lands irrigable from said proposed canal for the conduct of water upon any such lands, or that any owner of lands not now irrigated from existing acequias, desires or intends to irrigate such lands from plaintiff's canal when completed.

66 XVII.

That the proposed canal of the plaintiff will cross and recross the existing acequias of Bernalillo nine times within a distance of one mile of its length.

XVIII.

That some of the defendants and some of their associates are the owners of lands through which the plaintiff proposes to construct its canal.

The court finds as conclusions of laws from the facts found:

I.

That the plaintiff corporation is entitled to exercise the power of eminent domain.

II.

That the plaintiff, by the filing of its articles of incorporation with the secretary of the Territory of New Mexico and complying with the provisions of the act under which it is incorporated, has acquired a right to construct its canal and reservoirs to divert through its proposed canal surplus and unappropriated waters flowing in the Rio Grande and that such a right of eminent domain does not depend upon the ownership of lands by plaintiff or the employment of plaintiff prior to the construction of its canal by owners of lands to carry water for such owners.

III.

That the defendants, at the time of the filing of the complaint herein, unlawfully obstructed the plaintiff in the exercise of
67 powers lawfully conferred upon it by the act under which it is incorporated.

IV.

That the defendants do not and cannot in this action lawfully represent the rights of such persons claiming a right to the use of the waters of the Rio Grande, by prior appropriation, when the appropriation of such persons was effected at a point below the mouth of the proposed canal of plaintiff.

V.

That the defendants cannot lawfully set up in this action any rights secured to them and their associates or their predecessors in title by the treaty of Guadalupe Hidalgo and that the allegations of paragraph ten of the answer of defendants with reference to the treaty rights of defendants — immaterial.

VI.

That the plaintiff is entitled to the relief demanded in the complaint, including a perpetual injunction as prayed for.

VII.

That defendants are not entitled to any part of the relief demanded in their cross-complaint but the same should be dismissed.

Wherefore the court doth order, adjudge and decree that the temporary injunction heretofore granted and continued against the defendants enjoining them from interfering and obstructing and preventing the plaintiff, its agents and servants from entering upon, examining and surveying so much of the lands of the defendants as are necessary for the construction of said canal, and the lawful prosecution of the same, is hereby made perpetual.

68

It is further ordered, and adjudged and decreed that the cross-complaint of defendants be and the same is hereby dismissed, and the plaintiff have and recover of the defendants their costs in this behalf expended, to be taxed and that execution issue therefor.

To which findings and judgment defendants then and there excepted and still except and thereupon the defendants by their counsel moved the court to set aside the foregoing findings and judgment and grant them a new trial for reasons set forth in a motion in writing filed in the cause and the court having seen the said motion and being fully advised of and concerning the same doth overrule said motion, to which defendants excepted and still except and thereupon the defendants by their counsel pray an appeal to the honorable the supreme court of the Territory of New Mexico, which is granted.

JOHN R. McFIE, *Judge.*

And thereupon, to wit, on said 7th day of October, A. D., 1899, there was filed in the office of the clerk of the district court of the first judicial district of the Territory of New Mexico, within and for the county of Santa Fé, a motion for a new trial, which said motion is in words and figures following to wit:

69

In the District Court of the First Judicial District of the Territory of New Mexico within and for the County of Santa Fé.

THE ALBUQUERQUE LAND & IRRIGATION CO., Plaintiff,
vs.
TOMAS C. GUTIERREZ ET AL., Defendants. } 3956.

TOMAS C. GUTIERREZ ET AL., Cross-plaintiffs,
vs.
THE ALBUQUERQUE LAND & IRRIGATION CO., Cross-defendants. } 3956.

Comes now the defendants and cross-plaintiffs by Neill B. Field, their attorney, and move the court to set aside the findings and judgment herein and to grant them a new trial for the following reasons, to wit:

I.

Because the findings of fact are not responsive to all of the issues in the cause.

II.

Because the facts found are not sufficient to support the judgment.

III.

Because the court refused to find material facts which were put in issue by the pleadings and as to which there was evidence.

IV.

Because the court in finding of fact number five attempts
70 to qualify the legal effect of said finding and to leave it open to the plaintiff to question hereafter the validity of the prior appropriation, therein found to have been effected by defendants and cross-plaintiffs and their associates.

V.

Because the conclusions of law are erroneous and are not supported by the facts found.

VI.

Because the court should have concluded as matter of law from facts found that plaintiff is not authorized to exercise the power of eminent domain.

VII.

Because the court should have concluded as matter of law from the facts found that the plaintiff has no right to divert any portion of the waters of the Rio Grande, through the proposed canal.

VIII.

Because the judgment should have been in favor of defendants on the issue in the original case.

IX.

Because the judgment should have been in favor of cross-plaintiffs in the cross-suit.

X.

Because of divers errors and *irregulations* apparent on the face of the record whereby the defendants and cross-plaintiffs were prevented from having a fair and impartial trial.

NEILL B. FIELD,
Attorney for Defendants.

71 And afterwards, to wit, on the 30th day of October, A. D. 1899, there was filed in the office of the clerk of the district court of the first judicial district of the Territory of New Mexico,

within and for the county of Santa Fé, a præcipe for transcript, which said præcipe is in words and figures following, to wit:

TERRITORY OF NEW MEXICO:

Santa Fé District Court.

ALBUQUERQUE LAND AND IRRIGATION COMPANY
vs.
TOMAS C. GUTIERREZ ET AL. } No. 3956.

Præcipe for Transcript for the Supreme Court.

To A. M. Bergere, Esq., clerk of the district court of Santa Fé county.

SIR: The defendants in the above-entitled cause desire to review in the supreme court of the Territory of New Mexico the action of the district court in the following particulars, that is to say:

I.

The granting of the injunction on the original complaint.

II.

The sufficiency of the facts found to support the judgment rendered.

III.

The correctness of the district court's conclusions of law based upon the facts found.

IV.

The judgment in favor of plaintiff.

72

V.

The refusal of the court to render judgment in favor of cross-plaintiffs on their cross-complaint.

VI.

The refusal of the court to find upon all the issues of fact raised by the pleadings.

VII.

The refusal of the court to dismiss the complaint.

You are further notified that the defendants deem only a part of the record in this cause necessary to the review of the questions enumerated and you are therefore required to make up a transcript for the supreme court to consist of the following:

I.

The complaint and Exhibit "A" thereto.

II.

The answer and cross-complaint.

III.

The answer of the plaintiff to new matter contained in answer of the defendants.

IV.

The reply of the cross-plaintiffs to the answer of the cross-defendants.

V.

The original injunction issued.

VI.

All of the record entries in said cause both in the Bernalillo district court and the district court of Santa Fè county.

73 VII.

The judgment.

VIII.

The motion to set aside judgment and for a new trial.

IX.

This præcipe.

All other papers not herein enumerated are to be by you omitted from your transcript and you will certify to the transcript to be made in accordance with the requirements of this præcipe.

NEILL B. FIELD,
Attorney for Defendants.

TERRITORY OF NEW MEXICO, }
First Judicial District, County of Santa Fé. }

I, A. M. Berger, clerk of the district court of the first judicial district, of the Territory of New Mexico, in and for the county of Santa Fé, do hereby certify that the foregoing sixty-six (66), pages, this page included, contain a true, correct and complete transcript of so much of the record and files of my said office as is specified in the defendants' præcipe in a certain cause lately pending in said district court wherein The Albuquerque Land and Irrigation Company is plaintiff, and Tomas C. Gutierrez, *et al.*, are defendants.

In witness whereof I have hereunto set my hand, and
[SEAL.] affixed the seal of said district court, this 16th day of November, A. D. 1899.

A. M. BERGERE,
Clerk of said District Court.

74 And afterwards, to wit, on the 7th day of December, there was filed in the office of the said clerk of the said supreme court, an assignment of errors, which said assignment of errors, was and is in words as follows, to wit:

In the Supreme Court of the Territory of New Mexico, January Term A. D., 1900.

ALBUQUERQUE LAND & IRRIGATION COMPANY, Appellee,
vs.
TOMAS C. GUTIERRES, PEDRO GRIEGO Y APODACA, JESUS Zamora, Benito Jaramillo, and Leon Montaya, Appellants. } No. 858.

Assignment of Errors.

Come now the said appellants, and show to the court here that in the record, proceedings and judgment of the district court in the above-entitled cause there is manifest error to the prejudice of these appellants, in this, to wit:

I.

The court erred in granting the injunction on the original complaint.

II.

The court erred in rendering judgment in favor of the appellee on the facts found because the said facts were insufficient to support the said judgment.

III.

The court erred in refusing to find material facts which were put in issue by the pleadings.

75

IV.

The court erred in refusing to adjudge as matter of law from the facts found that the appellee is not authorized to exercise the power of eminent domain.

V.

The court erred in its conclusion of law No. 2, as follows: "That the plaintiff, by the filing of its articles of incorporation with the secretary of the Territory of New Mexico and complying with the provisions of the act under which it is incorporated, has acquired a right to construct its canal and reservoirs to divert through its proposed canal surplus and unappropriated waters flowing in the Rio Grande and that such right of eminent domain does not depend upon the ownership of lands by plaintiff or the employment of plaintiff prior to the construction of its canal by owners of lands to carry water for such owners."

VI.

The court erred in its conclusion of law number 3, as follows: "That the defendants, at the time of the filing of the complaint herein, unlawfully obstructed the plaintiff in the exercise of powers lawfully conferred upon it by the act under which it is incorporated."

VII.

The court erred in its conclusion of law number 4, as follows: "That the defendants do not and cannot in this action lawfully represent the rights of such persons claiming a right to the use of the waters of the Rio Grande, by prior appropriation, when the appropriation of such persons was effected at a point below the mouth of the proposed canal of plaintiff."

VIII.

The court erred in its conclusion of law number 5, as follows: "That the defendants cannot lawfully set up in this action any rights secured to them and their associates or their predecessors in title by the treaty of Guadalupe Hidalgo and that the allega-
76 tions of paragraph ten of the answer of defendants with reference to the treaty rights of defendants are immaterial."

IX.

The court erred in refusing to dismiss the complaint.

X.

The court erred in refusing to grant the appellants the relief demanded in their cross-complaint.

Wherefore the said appellants, pray that the said record may be seen and examined by this honorable court; that the errors of the said district court may be corrected, its judgment annul-ed and that these appellants may be restored to all things which they have lost by reason thereof.

NEILL B. FIELD,
Attorney for Appellants.

And afterwards, on to wit: at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, the seat of government, on the first Wednesday after the first Monday in January, the same being Wednesday the 3rd day of January, A. D. 1900 on the thirty-third day thereof, the same being Friday February 9th, A. D. 1900, the following among other proceedings, were had, as follows, to wit:

TOMAS C. GUTIERREZ ET AL., Appellants, *vs.* ALBUQUERQUE LAND & IRRIGATION CO., Appellee.	No. 858. Appeal from District Court, Santa Fé County, on Change of Venue from Bernalillo County.

This cause coming on to be heard upon the transcript of record, assignment of errors, and briefs of counsel, was argued by Neill B. Field, Esq., for appellants, and W. B. Childers, Esq., for
77 appellees, and submitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, to wit on the thirty-seventh day of said regular term, of the said supreme court, the same being Tuesday the 3rd day of May, A. D., 1900, the following among other proceedings were had, as follows, to wit:

TOMAS C. GUTIERRES ET AL., Appellants, vs. ALBUQUERQUE LAND & IRRIGATION Co., Appellee.	No. 858. Appeal from District Court, Santa Fé County, on Change of Venue from Bernalillo County.

This cause having been argued by counsel and submitted to and taken under advisement by the court upon a former day of the present term, the court being now sufficiently advised in the premises, announces its decision by Chief Justice Mills, Associate Justices Parker and Leland concurring, affirming the judgment of the court below, for reasons stated in the opinion of the court on file. It is therefore considered and adjudged by the court that the judgment of the district court in and for the county of Santa Fé, whence this cause came into this court, be, and the same is hereby affirmed, and that in accordance therewith, the injunction heretofore granted against the appellants, by the said district court, is hereby affirmed and made perpetual, and the cross-complaint of the appellants against the appellee is dismissed and that the appellee, The Albuquerque Land & Irrigation Company, do have and recover of and from the appellants, its costs in this behalf expended as well in this court as in the court below, to be taxed, and that it may have execution therefor.

And afterwards to wit: on the thirty-seventh day of said regular term, the same being Tuesday, the 3rd day of May,
78 A. D. 1900, the following among other proceedings were had as follows, to wit:

TOMAS C. GUTIERRES ET AL., Appellants, vs. ALBUQUERQUE LAND & IRRIGATION Co., Appellee.	No. 858. Appeal from District Court, Santa Fé County, on Change of Venue from Bernalillo County.

Now comes Neill B. Field, attorney for appellants in the above-entitled cause and prays an appeal to the honorable the Supreme Court of the United States, and moves the court to find the facts in said cause in accordance with the requirements of the act of Congress in such cases made and provided and the court being sufficiently advised in the premises, thereupon orders that the said appeal be, and the same hereby is granted, and it is ordered to be certified to the Supreme Court of the United States, that this court adopts as its own the findings of fact made by the judge of the district court at the time of the rendition of the judgment in this case as the same are set forth at large in the transcript.

And afterwards, to wit, on the 3rd day of May, A. D. 1900, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, the opinion of the court, which said opinion of the court, is in words and figures, as follows, to wit:

79 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1900.

THE ALBUQUERQUE LAND & IRRIGATION Co., Appellee,
vs.
TOMAS C. GUTIERREZ ET ALS., Appellant-.

No. 858. Appeal from District Court, Santa Fé County.

Appeal from the first judicial district court, on change of venue from the district court of the second judicial district, for the county of Bernalillo.

Childers & Dobson, attorneys for appellee.
Neill B. Field, Esq. attor*b*ey for appellants.

Opinion of the Court.

The facts necessary to an understanding of this case are fully stated in the able opinion rendered by the court below, which is a part of the record in this case, and it is not necessary to restate them here.

Two questions are to be determined in this case, first, can a company be lawfully incorporated under chapter XII of the Acts of 1887, (sections 468–493 Compiled Laws of 1897,), go upon the lands of private persons for the purpose of making a preliminary survey, and acquire the right of way through such lands by the exercise of the right of eminent domain under the terms of said act, unless it is shown that there is a surplus of water in the stream from which it is proposed to divert water unappropriated and subject to diversion and appropriation? Second, can the company organized under such act exercise the powers granted thereby, unless it is itself the owner of the lands to be irrigated by the water to be so diverted, or have been previously employed by the owners of such land to divert water for their use?

As to the first proposition, it is sufficient to say that the court below has found as a fact that there is a surplus of water in the Rio Grande subject to appropriation, and that from said river the
80 appel-ees proposed to divert, carry and distribute the same. There is ample evidence to sustain the findings of the court below, and it is a well-settled proposition that this court cannot disturb such findings.

It is undoubtedly true that the diversion and distribution of water for irrigation and other domestic purposes in New Mexico, and other Western States where irrigation is necessary, is a public purpose. This has been held by the Supreme Court of the United States in the case of Fallbrook Irrigation District *vs.* Bradley, 164 U. S., 112. It seems to us to be equally well settled that it is not necessary that

the company diverting, carrying, delivering and distributing water for such purpose shall be itself a consumer, provided that the water when so carried and distributed shall within a reasonable time be applied to a beneficial use. The able opinion of the court below discusses these propositions so fully, that we adopt its opinion and make it the opinion of this court, as follows:

81 This cause was brought into this court by change of venue from the county of Bernalillo and has been submitted upon bill, answer and replication; cross-bill, answer and replication; oral and documentary evidence, and arguments of counsel.

To avoid unnecessary repetition, let it be understood that wherever the word complainant or plaintiff is used it means cross-defendant as well, and wherever defendant is used it means cross-plaintiff or complainant as well, as the issues joined are embodied in both the original and cross suit and they will be considered together.

The proceedings had in these causes before his honor Judge Crumpacker, presiding judge of the second judicial district, have restricted somewhat the issues before this court, inasmuch as this court will not presume to review the action of the court of the second judicial district, whose jurisdiction is co-extensive with that of this court.

The following proceedings were had in the second judicial district court before the venue was changed to this court. Temporary injunction was granted upon complainant's bill, January 17, 1898, and the defendants were ordered to show cause why the injunction should not be continued on the 25th day of January, 1898.

Defendants filed answer, cross-complaint and affidavits, January 25th, 1898, and the cause was heard by the court and taken under advisement.

On the 8th day of February, 1898, the court rendered his opinion in favor of the complainant in the bill, and entered an order continuing the injunction in force against the defendants until

82 the further order of the court, and denying the injunction prayed for by the defendants in their cross-bill.

On the 19th day of February, 1898, the plaintiff in the original bill filed demurrer to the answer and cross-complaint of the defendants, but upon hearing, the court overruled the demurrer by an order entered March 12, 1898. The cross-defendants filed answer to the cross-complaint, March 14, 1898, and the necessary replications being filed, the issues were fully made up on the complaint and cross-complaint.

On the 18th of May, affidavit and motion for change of venue was filed, and upon the same day objections were filed to the granting of the motion, but the court sustained the motion and ordered the venue changed to the first judicial district.

It will thus be seen that before the cause came into this court, his honor, Judge Crumpacker, had not only granted the injunction prayed for in the original bill, but ordered same continued in force until further order of the court; that the injunction prayed for by the defendants in their cross-bill had been denied; and that the demurrer of the complainants to the new matter in the answer of the defendants and to their cross-complaint had been overruled. There-

fore, all these matters have been eliminated and will not be reviewed here. The entire case is before this court on its merits, but the sole question to be determined is, whether or not upon the pleadings and proofs now before the court, either of the parties are entitled to a perpetual injunction, and if so, which. To determine this, the court must decide whether or not the Albuquerque Land and Irrigation Company have a legal right to construct canals, ditches or pipe lines authorized by their charter, and whether
83 or not they have the right to enter upon, examine and survey, and which practically involves the right to condemn and excavate, so much of the land of private owners along the line of their proposed canals or ditches as may be necessary for such purpose.

If complainants have this right under the law, then it follows that the defendants had no legal right to interfere with or obstruct them in the pursuit of this lawful purpose. On the other hand, if the complainant had not such a legal right, the cross-complainants had a right to prevent the company from attempting to exercise the right of eminent domain upon their lands along the proposed canal. Many questions are suggested by the pleadings that I do not deem it necessary or proper to consider in determining this case, indeed, the proofs are not sufficiently specific to enable the court to do so. I apprehend that the sole reason why the court of the second judicial district did not award the complainants a perpetual writ of injunction was because the court was of the opinion that the main question in the case, viz., whether or not there was surplus water in the river that the complainants would have a right to conduct through their proposed canal, for the purpose of irrigation or for some other beneficial use, should be determined upon proof and not upon bill, answer and affidavits.

That counsel on both sides so understood the issue is plain from the nature of the oral and documentary evidence taken at the hearing. The evidence taken on behalf of the complainant tended to prove that there was surplus water in the Rio Grande at the point where the proposed canal was to be taken out, and the evidence taken on the part of the defendants, to show that all of the
84 water of the river had been appropriated and that there was no surplus water. Of course, there was some proof as to other matters, but this was the main controversy as shown by the evidence. Furthermore, in my opinion, the nature of the case, as well as the law applicable thereto, makes the matter of surplus water the controlling question.

In 1887 the legislature of this Territory passed an act providing for the formation of companies for the purpose of constructing irrigation and other canals, and the improvement and colonization of lands. Section 1 of chapter 12, Laws of 1887, is as follows:

"Any five persons who may desire to form a company for the purpose of constructing and maintaining reservoirs and canals, or ditches and pipe lines, for the purpose of irrigation, mining, manufacturing, domestic and other public uses, including cities and towns, and for the purpose of colonization and improvement of lands in

connection therewith; for either or both of said objects, either jointly or separately, shall make and sign articles of incorporation, which shall be acknowledged before the secretary of the Territory, or some other person authorized by law to take the acknowledgment of conveyances of real estate, and when so acknowledged such articles shall be filed with such secretary."

That the complainant company was incorporated under this act is admitted by the defendants in their answer. Section 2 provides in paragraph 2 that:

"The purpose or purposes for which said company is formed, and if the object be to construct reservoirs and canals or ditches and pipe lines for any of the purposes herein specified; the beginning point and terminus of the main line of such canals and ditches and pipe lines; and the general course, direction and length thereof shall be stated."

The articles of incorporation of the complainant company provide:

85 "The purpose for which said company is formed and created a body politic and corporate is to build, construct and maintain reservoirs and feeders therefor, canals, ditches, pipe lines, flumes and such branch lateral and side canals, pipe lines, ditches and flumes as may be necessary for the supplying of water for the purpose of irrigation and the improvement and colonization of lands in connection with such irrigation; and to acquire, purchase, lease and sell water, water rights, reservoirs, canals, ditches, pipe lines, flumes and lands in the furtherance of said purpose."

Section 3 of said article fixes the beginning point, course, direction, distance and terminus of their proposed canal, as required by law. From an examination of the law referred to and the articles of incorporation just quoted, it seems clear that the complainant company has brought itself within the terms of the law and is therefore entitled to the benefits, and to exercise all the powers conferred by the act.

The legislature which passed the act is charged with a knowledge of the community ditch system of the Territory, and its benefits and defects. In enacting the law under consideration it was manifestly the intention of the legislature, while preserving the present system and the rights of parties under it, to provide for a more modern and improved system of irrigation in the future, wherever it was desired and did not interfere with prior rights. That improved methods of storing and conducting water by means of reservoirs, canals, ditches and pipe lines, may be constructed and operated, the right of eminent domain is fully given by the act in the following language:

CHAPTER 12, SECTION 17. "Corporations formed under this
86 act for the purpose of furnishing and supplying water for any of the purposes mentioned in section one, shall have, in addition to the powers hereinbefore mentioned, rights as follows:

1. "To cause such examinations and surveys for their proposed reservoirs, canals, pipe lines and ditches to be made, as may be necessary to the selection of the most eligible locations and advan-

tageous routes, and for such purpose, by their officers, agents and servants to enter upon the lands or water of any person, or of this Territory.

2. "To take and hold such voluntary grant of real estate and other property, as shall be made to them in furtherance of the purposes of such corporation.

3. "To construct their canals, pipe lines or ditches upon or along any stream of water.

4. "To take and divert from any stream, lake or spring the surplus water, for the purpose of supplying the same to persons, to be used for the objects mentioned in section one of this act, but such corporation shall have no right to interfere with the rights of, or appropriate the property of any person except upon the payment of the assessed value thereof, to be ascertained as in this act provided: And, provided, further: That no water shall be diverted, if it will interfere with the reasonable requirements of any person or persons using or requiring the same, when so dive-ted.

5. "To furnish water for the purpises mentioned in section one, at such rates as the by-laws may prescribe; but equal rates shall be conceded to each class of consumers.

6. "To enter upon and condemn and appropriate any lands, timber, stone, garvel, or other material that may be necessary for the uses and purposes of said companies."

It is difficult to see how the legislature could have conferred more complete powers upon such companies than it did by that act, and that the legislature has power to enact a law granting the
87 right of eminent domain is settled, provided the property taken is for a public purpose.

That lands condemned and used for the right of way of reservoirs, canals, ditches and pipe lines, for the purposes specified in the act above referred to, are for a public purpose, is too plain to require extended discussion. Congress has liberally granted this right over the public domain for the purpose of the construction of railroads and for other public uses, and State and territorial legislatures have granted this right for purposes of irrigation, railroads, public roads and for other purposes. In arid regions the construction of systems of reservoirs, canals and ditches for the use of the public in irrigating lands, is certainly as much for a public purpose as railroads or public roads, and authority to exercise the right of eminent domain is even more of a necessity than for such purposes.

Broder *vs.* Mining Co., 101 U. S., 274.
Fallbrooks Irrigation District *vs.* Bradley, 164 U. S., 112.
Bridal Veil Lumbering Co. *vs.* Johnson, 46 Pac., 790.
14 Lawyers' Annotated Reports, page 762.
Oury *vs.* Goodwin, 26 Pac., 377.

The legislature of this Territory, however, placed a specific limitation upon the exercise of the right of public domain, by the use of the following language: "To take and divert from any stream, lake or spring, the surplus water." Section 17, subsection 4.

If, therefore, the complainant company proposed to divert water,

and obtain a supply for its canal from the Rio Grande alone, under the above section its power to exercise the right of eminent
88 domain would be subject to its ability to show that there was surplus water in said stream, and for that purpose the burden of proof is upon the complainant, as the court has shown.

Now, what is surplus water? Surplus water, for the purposes of this case, is water which has not been diverted and applied to a beneficial use prior to the filing of complainant's bill. To state the proposition another way: Surplus water is all water running in the Rio Grande not subject to a valid prior appropriation.

Defendants' contention that there is no such thing as private ownership in the waters of the streams of this Territory is undoubtedly correct. All the right obtainable in the water of the public streams of the Territory is the right to appropriate so much thereof as is actually used for some beneficial or legal purpose. This appropriation may become a vested right by continuous use, or it may be lost by non-use, and in this the right differs from private ownership.

The doctrine of the common law no longer obtains in what is known as the arid and mountainous region of the West, and the doctrine of prior appropriation has been substituted for the common law as a matter of necessity, on account of the peculiar conditions existing in most, if not all, the mountain States and Territories.

In the case of United States *vs.* The Rio Grande Dam & Irrigation Co. (a case decided May 22, 1899) the Supreme Court of the United States discusses the law of water rights and refers to the laws of Congress on the subject, as follows:

"Notwithstanding the unquestioned rule of the common law in reference to the right of a lower riparian proprietor to insist upon the continuous flow of the stream as it was, and although
89 there has been in all the Western States an adoption of recognition of the common law, it was early developed in their history that the mining industry in certain States, the reclamation of arid lands in others, compelled a departure from the common-law rule, and justified an appropriation of flowing waters both for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those States, by custom and by State legislation, a different rule—a rule which permits, under certain circumstances, the appropriation of the waters of a flowing stream for other than domestic purposes. So far as these rules have only a local significance, and affect only questions between citizens of the local Federal courts. In 1863 Congress passed the following act (14 Stat. 253; Rev. Stat. 2339):

"'Whenever, by priority of possession, right to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person in the construction of any ditch

or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.'"

* * * * * * *

In 1887 an act was passed for the sale of desert lands, which contained in its first section this proviso (19 Stat., 377):

"Provided, however, that the right to the use of water by the persons so conducting the same on or to any tract of desert land of 640 acres shall depend upon *bona fide* prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of lakes, rivers and other
90 sources of water supply upon the public lands and not navigable, shall remain and be held free for appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

On March 3, 1891, an act was passed repealing a prior act in respect to timber culture, the eighteenth section of which provided (26 Stat., 1101):

"'That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which may have filed, or may hereafter file, with the Secretary of the Interior, a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and 50 feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth and stone necessary for the construction of such canal or ditch; provided, that no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation, and the privilege of water for irrigation and other purposes under the authority of the respective States and Territories.'"

This extended quotation from the most recent statement of the doctrine from that court will obviate the necessity of citing other cases.

Water is declared free in the public streams of the State of Colorado, by express provision of the constitution of that State, and the courts of that State apply the doctrine of prior appropriation in determining its water rights. The decisions of the courts of Colorado are, therefore, very instructive in similar litigation in this
91 Territory, inasmuch as the legislature of this Territory in 1876 declared that "All currents and sources of water flowing from the natural sources in the Territory of New Mexico, shall be and they are by this act declared free." Section 52, Compiled Laws of 1897.

The doctrine of prior appropriation is the law governing water rights in this Territory, and to constitute a valid prior appropriation of the water of the Rio Grande two things must be established.

1. There must be a rightful diversion.

2. An application to some beneficial use.

And neither of these is sufficient without the other. It is not essential that the water shall be used by the person or corporation diverting the water from the stream, for the law is well settled that water may be diverted from the streams by canals and ditches owned by individuals or corporations, and conducted long distances and beneficially used by others. This is fully established by the large canal and ditch systems existing in California, Colorado, Arizona and many other States. In such cases the beneficial user is held to have constituted the ditch or canal company his agent to divert and conduct water for his use, and the Latin maxim, *Qui facit per alium, facit per se*, seems to apply in such cases.

I see no reason, therefore, why such reservoir, canal and ditch companies as are authorized by the laws of the Territory should not be allowed to perform services in connection with the irrigation of lands in this Territory similar to those performed by such corporations in other States and territories where the same law, as to water rights, prevails. I can see no legal reason for preventing them from exercising the power conferred upon such companies by the statute, provided there is surplus water subject to appro-
92 priation through the agency of such company.

To determine whether or not there was any surplus water in the Rio Grande, subject to appropriation and use by complainant's proposed canal or ditch, it becomes necessary to ascertain from the evidence how much of the waters of that stream had been legally diverted and used for a beneficial purpose prior to the inception of plaintiff's rights.

I find, from the evidence, that the headgate of complainant's proposed canal is to be at a point on the Rio Grande three-eight-s (⅜) of a mile below or south of the Indian village of San Felipe, about 28 miles above the city of Albuquerque; that the terminus or point of discharge into the river is at the railroad bridge near Isleta, the entire length of the canal to be about 35 miles; the present proposed terminus is at the city of Albuquerque; that the engineer of the company, Mr. Harroun, was proceeding with a survey of the line between Albuquerque and the headgate when the interference of the defendants occurred, which led to the legal proceedings in which injunction issued as above referred to. The capacity of the canal I find to be 210 cubic feet of water per second.

There is controversy as to the number of ditches on either side of the river between the proposed headgate of the proposed canal and Albuquerque, and also from Albuquerque to the terminus. All of the witnesses agree that there are at least ten acequias taking water from the river between the proposed headgate and Albuquerque on the east side, and at least three upon the west side. There are seven ditches heading below Albuquerque, down to Isleta, as shown
93 by Mr. Follett's report, and all upon the west side of the river.

The capacity of these ditches must be ascertained from the testimony of Mr. Harroun, and Mr. Follett's report, as none of the other witnesses testify upon this point.

Mr. Harroun, and Mr. Follett's report practically agree that the 10 ditches on the east side of the river above Albuquerque have a capacity of 180 cubic feet per second, and that the three ditches on the west side above the city have a capacity of 45 cubic feet per second. Mr. Follett's report alone gives the capacity of the ditches between the city and Isleta, and from this we find their capacity to be 273 cubic feet per second. Thus I find that the capacity of all the old ditches along the route of the proposed canal to have been 498 cubic feet per second, and this amount of the water of the Rio Grande was legally diverted by the old ditches prior to the existence of any rights of the complainant.

The proof as to whether or not this entire amount was used for a beneficial purpose is not sufficiently specific to enable the court to find that it was not. Mr. Harroun is of the opinion that about one-half of the water diverted by the old ditches is wasted, and while the court has no doubt that a large portion of the water thus diverted is wasted, still the proof is too general to warrant the court in holding that any specific part is wasted and not applied to a beneficial use. For the purposes of this case, therefore, I feel compelled to hold that there has been a prior appropriation of the water of the Rio Grande to the extent of the capacity of the ditches above referred to, but the court realizes that this is a very uncertain conclusion, as the testimony of Mr. Harroun is, that there are
94 about 1,800 acres of swamp and meadow lands made thus by the waste waters from the old ditches. However, as this is not a final determination of this question, except for the purposes of this inquiry, it is the duty of the court to overestimate rather than underestimate the quantity of water appropriated, that prior rights may be fully protected, in view of the uncertainty of the evidence on this point.

Turning now to the flow of water in the river at the point where the headgate of the proposed canal is to be located, I find the most reliable evidence to be that of Mr. Harroun, and the data submitted in connection with his testimony, inasmuch as his personal researches and investigations have been much greater than that of the other witnesses, and being a competent civil engineer, his means of knowledge is much better than that of other witnesses. Indeed, he is the only witness on either side who attempts to testify as to the amount of water flowing in the Rio Grande, in any specific manner. The other witnesses testify that the river was dry at certain times, and give their opinion as to whether or not there was any surplus during the dry season, but none of them attempts to testify as to the amount of water flowing in the stream. Mr. Follett's report as to this matter is based largely upon data furnished by Mr. Harroun, as the report states, and as to certain dates and places, agrees with the testimony and data of Mr. Harroun, but Mr. Harroun testifies much more fully and submits data made upon more extensive and reliable investigation than that upon which the

Follett report is based, and is, therefore, more satisfactory. These measurements are only approximately correct, it is true, but they are the best obtainable evidence and are superior to the evi-
95 dence not based upon measurements.

In regard to the flow of water in the Rio Grande at Embudo, Rio Grande and San Marcial for the years 1895, 1890 and 1897, Mr. Harroun testifies that:

"In 1895 the flow at Embudo aggregated 885,279 acre feet. That flow may be taken as the flow of San Marcial. The flow at Rio Grande during the same year was 1,392,507; there was an increase between these two points of 57 per cent.

"Between Embudo and San Marcial?

"A. Yes, sir; 57 per cent. in 1895, between these two points. In 1896, the flow at Embudo was 467,960 acre feet.

"What was it at San Marcial?

"A. There is no record made for 1896; no record whatever; although the gage heights are kept continually the channel is so shifting that with the few measurements that were made during that year no careful conclusions can be drawn from the gage heights; but in 1896, the flow at Embudo was 467,960 acre feet with an increase of 47 per cent. between that and Rio Grande, which was 698,072 acre feet; the flow at San Marcial during 1896 was 566,499, or a loss between these two points of only 19 per cent.; in 1897, the Embudo flow was 1,112,382 acre feet, and Rio Grande, 1,909,060 acre feet, showing an increase between these two points of 71 per cent.; the flow at San Marcial was 2,331,586 acre feet, an increase of 22 per cent. between these two points.

"Q. Explain what you mean by acre feet?

"A. An acre foot is the amount covering one acre one foot, 43,560 cubic feet equal to about one acre foot in every 24 hours.

"Q. I will ask you to state if you have the data from which you can give the flow at these points in the months beginning with February and ending with October in each year of these years?

"A. Yes, sir; at Embudo the mean flow in 1895, during the month of February, was 503 cubic feet a second; in March,
96 759; April, 2,541; May, 2,679; May, 2,679; June, 3,021; July, 1,335; August, 1,080; September, 636; and October, 494.

"Q. In 1895?

"A. Yes, sir. At Rio Grande the same year, the flow in February was 591, this is the mean flow for the month; March, 1,371; April, 5,075; May, 4,411; June, 4,630; July, 1,768, August, 1,481; September, 722; October, 707; there is no record of San Marcial during 1895. In 1896, at Embudo, the mean February flow was 551; March, 957; April, 17,797; May, 1,598; June, 367; July, 299; August, 249; September, 222; October, 349; for 1896, at Rio Grande, there is no record from March 4th to March 31st; the first three days of March giving a mean flow of 1,355 second feet; for April, 3,483; May, 2,704; June, 535; July, 412; August, 243; September, 299, and October, 461: for 1896, at San Marcial the mean flow for February was 680; March, 679; April, 3,142; May, 2,019; June,

466; August, 1,181; September, 130; October, 742. In 1897, at Embudo, the flow in cubic feet per second was, for February, 407; March, 561; April, 1,691; May, 5,443; June, 4,596; July, 1,248; August, 388; September, 344, and October, 1,535; at Rio Grande for the same year, the flow was for February, 541; March, 985; April, 5,056; May, 11,454; June 6,153; July, 1,580; August, 458; September, 650; October, 2,227; for San Marcial during the same months, the flow for February was, 434; March, 660; April, 3,584; May, 12,173; June, 6,156; July, 1,117; August, 101; September, 1,907; October, 4,019; as I have said before the record for 1898 is not concluded; that is the mean flow for the months mentioned.

"Q. Now explain what you mean by mean flow?

"A. The mean flow as there noted, is the sum of the acre feet per day divided by the number of days in the month, the sum of the acre feet and the number of feet per second divided by the number of days in the month.

"*Q.* I want to get the flow in each month, for a given day in each month, for the months of May, June, July and August, of each of the years from which points your observations were taken nearest to this ditch.

97 "A. The nearest station is at Rio Grande; the flow for April was 1,610 cubic feet per second; these are all figures in cubic feet per second; in May, 2,240; June, 1,120; July, 1,005; August, 705; September, 530. In 1896 the mean flow for April was 1,265; May, 255; June, 255; July, 210; August, 255; September, 350. For 1897 the mean flow for April was 10,200; May, 8,800; June, 2,486; July, 200; August, 240; and September, 360.

"Q. How far is this Rio Grande station from the proposed headgate of this plaintiff's canal?

"A. It is about 35 miles."

Mr. Follett's report shows the following flow at Rio Grande station for the years 1895 and 1896: Summer flow in second feet in 1895—April, 5,070; May, 4,615; June, 4,630; July, 1,170; August, 1,480; September, 720. In 1896—April, 3,480; May, 2,710; June, 580; July, 440; August, 195; September, 590. Winter flow for same years at same station: October, 705; November, 835; December, 710; January, 760; February, 790; March, 1,370.

Rio Grande station is selected for illustration because it is the nearest station, where measurements were taken yearly, to the headgate of the proposed canal, thirty-five (35) miles, and Mr. Harroun further testifies that the flow at the headgate was substantially the same as at Rio Grande station for the reason that there are tributaries between those points supplying a sufficient amount of water to equal the loss from seepage and evaporation.

From this testimony I find, as a fact, that while during a few months, or parts of the summer months, of the years 1894, 1895, 1896 and 1897, there was no surplus water flowing in the river at the proposed headgate, during a large majority of the months of each of these years there was a large amount of surplus water flowing

98 past that point. All of the witnesses testify that the years 1894, 1895 and 1896 were the dryest years known, some say

for 10 and others for 20 years, and the only years in which the river was dry at or above Albuquerque.

I also find, as a fact, that in a majority of the last ten years there has been surplus water flowing in the river at the prop-sed headgate at all times, as witnesses, some of whom were mayordomos of those ditches, testify there was no scarcity during those years.

I further find, as a fact, that the river became dry at Albuquerque about the last of June and remained so, as most of the witnesses testify, for 22 days in 1894, and also in July, 1896, the number of days cannot be definitely stated from the evidence. Mr. Follett's report states that the river was dry at Albuquerque through July, 1895, but Mr. Follett doubts this, and it would seem clear that it was not, as Mr. Follett's report states that there was "water all summer" in the river at Los Lunas. I find as a fact that the irrigation season begins in February and ends in October.

I find, as a fact, that the months of June, July, August and September, are considered the dry season, and I further find that what is known as the rainy season occurs during these months, also, so that it is possible for the dry season to become the wet season and the anomaly may be explained by stating that the term "dry season" refers to the water in the river rather than the rainfall.

I find, as a fact, that very few farmers, served by the present ditches, sow wheat, oats, barley or rye in the fall of the year, but do so in the spring, beginning during February or March; and I further find that very little, if any, of the water now appro-
99 priated is used for those crops after July 1st, in fact, very little is used for those crops after June 15th, but water is used for chile, corn, alfalfa and melons after that time, and for alfalfa as late as October. It appears, therefore, that less of the water diverted by the present ditches it used after the first of July, than is used before that date when the grain crops and all others are growing.

The witnesses for the defense were asked the following question, "From your knowledge of the existing system of community ditches and of the Rio Grande, is there, or is there not, any surplus of water in the Rio Grande in that vicinity during the dry season?" The answer was that there was no surplus.

As has been stated, there was also testimony that the river was dry in 1894 and 1896 at different dates during the dry season. It will be observed that this testimony is confined, especially, to the dry season. This period includes June, July, August and September, but as a matter of fact there is usually a large surplus in June, and frequently in September, also.

The limitation to the dry season makes the testimony immaterial, because if there was surplus water flowing in the river there at any time it was subject to diversion and use, and being surplus and unappropriated water there can be no injury done to any prior appropriator; the law will protect him in the use of the water actually appropriated. Sec. 17 of chap. 12, grants the right of eminent domain to companies utilizing surplus waters for certain beneficial purposes, and the use of the word surplus would indicate that the legislature had in mind streams whose waters had been in part

appropriated. If there is surplus and unappropriated water
100 in the stream, companies have a right to organize and exercise the powers conferred upon them by the statute and this right is not dependent upon a contingency such as the possible failure of the water supply during a few months of exceptional years.

The court takes judicial notice of the fact that from October until about the first of March in each year there is very little water used for any purpose by the farmers in the valley of the Rio Grande, and as a matter of law, it is not an invasion of his rights for a subsequent appropiator to use water after a prior appropriator has ceased to do so.

I am unable to ascertain the acreage in cultivation, except from the testimony of Mr. Harroun, as the other witnesses do not know and do not attempt to state it. Mr. Harroun says there are probably 12,000 acres there, subject to irrigation, but that only about 3,200 acres are served by the present ditches, and this is the extent of the present cultivation; and he further says that at least 7,000 additional acres could be served by the proposed canal if a supply of water equal to the capacity of the canal can be obtained.

The witnesses on behalf of the defendants testified that they did not know of any beneficial use to which complainants could put the water in the event of the construction of the proposed canal. Such evidence is not of much value in view of the testimony that there are 7,000 acres of irrigable land which the present ditches are unable to serve. If any part of this additional acreage could be brought under cultivation by means of the canal it would be a beneficial purpose within the meaning of the statute. It is evident that these witnesses so testified from a belief that there is no surplus water, or, that the present method of irrigating and cultivat-
101 ing lands cannot be imporved. I am of the opinion that the premises *is* wrong in either case and their conclusions necessarily wrong.

The court has found that there is surplus water in the Rio Grande during a majority of the months of every year, and is equally satisfied that the present system of both irrigating and cultivating lands in this Territory can be greatly improved by the adoption of more modern methods of storing and conducting water upon the lands, and a more economical use of it when so conducted. Mr. Follett's report shows that many of the present ditches were in use 100 years ago, and it would seem strange that a system one hundred old could not be improved upon.

I do not underestimate the present ditch system, for in some respects it is very good and so long as it is in existence its status and rights must be upheld by the courts; but that it is not an economical system, that it has no provision for storing water, and that there is an equal distribution of the water, is within the knowledge of this court, and is shown by the testimony.

The suggestion that the water cannot be used for a beneficial purpose during the six months when it is not used by the ordinary farmer I cannot accept. Mr. Blucher testifies that he uses water all

the year in his market gardening, and in view of the provision of the statute, and of complainant's charter, the court would not be warranted in holding that the water cannot be applied to some of the purposes declared to be a beneficial use by the statute.

The right of eminent domain may be exercised by corporations organized under chapter 12, Laws of 1887, in constructing
102 reservoirs, canals, ditches and pipe lines for the purpose of conveying surplus water for irrigation, manufacturing or mining purposes, and the exercise of this right is not dependent upon the ownership of lands by the company or contracts with customers for the use of water. These considerations may be important when the actual diversion of the water through the canal is attempted, but for the purpose of constructing the system the existence of surplus water is the controlling consideration. These companies are quasi-public servants, and their existence is authorized by law.

In Wheeler *vs.* Irrigation Co., 17 Pac., 487, the supreme court of Colorado says that such a canal is a "quasi-public servant. It exists largely for the benefit of others, being engaged in the business of transporting for hire water owned by the public to the people owning the right to its use. It is permitted to acquire certain rights as against those subsequently diverting water from the same stream. It may exercise the right of eminent domain."

In Coombs *vs.* Ditch Company, another Colorado case, it was held that an owner of land along the line of the ditch could compel the company to supply him with water; 28 Pac., 966.

In Broder *vs.* Mining Company, 101 U. S., 274, it was held that the rights of such companies "are rights which the Government had recognized and encouraged and was bound to protect."

In Ditch Company *vs.* Bennett, the court says:

"No sufficient reason has been suggested why the contemplated use may not be for and upon the possession of a person other than the appropriator. The authorities we have seem to support that it can be and we believe it is correct upon principle. We take it, therefore, that the *bona fide* intention, which is required of the appropriator to apply the water to some useful purpose, may comprehend a use to be made through some other person and upon lands and possession other than those of the appropriator. Thus the appropriator is enabled to complete and finally establish his
103 appropriation through the agency of the user."

It is also held that such canal companies "must be regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional rights, as well as a private enterprise prosecuted for the benefit of its owners."

Wyatt *vs.* Irrigation Co., 33 Pa., 147.

Reservoir Co. *vs.* Southworth, *supra.*

Strickler *vs.* Colorado Springs, 26 Pac., 313.

Oury *vs.* Goodwin, 26 Pac., 377.

The law laid down in the cases cited above is applicable to similar litigation in this Territory, as the law of prior appropriation governs

in both jurisdictions. These corporations are deemed to be beneficial in the development of the country and the right of eminent domain is accorded them to facilitate their operations. Subsec. 6 of sec. 17, quoted above, provides that lands, stone, timber, gravel or other material, or so much thereof as may be necessary, may be condemned and appropriated by such companies, but in case of a failure to agree upon compensation for property thus taken, sec. 18 provides:

"Should any such corporation be unable to agree with the owners as to the compensation to be paid for any such land, water, timber, stone, gravel or other materials, the amount shall be ascertained and determined by the appraisal of three disinterested commissioners, who shall be appointed on application of either party, and upon five days' notice to the other party, by the judge of the district court in and for the district in which such land, water, timber, stone, gravel or other material may be situated; and said commissioners, in their assessment of compensation, shall appraise such premises or property at what would have been the value thereof, if such reservoirs, canals, ditches or pipe lines for which such premises or property shall be required, had not, or was not in contemplation of being built or constructed; and upon a return into court of such
104 appraisement, and upon the payment of the clerk thereof, or to the parties entitled to such compensation, the amount so assessed by such commissioners, the land, water, timber, stone, gravel or other materials so appropriated shall be deemed to be taken by such corporation, which shall thereby acquire full title to the same, for the uses and purposes aforesaid."

In view of these provisions of these statutes, it cannot be considered an invasion of private rights, to condemn and appropriate so much of the lands of private owners as may be necessary, by such reservoir and canal companies. Compensation for such property is deemed sufficient for the owner, but the right to the use of so much water as has been lawfully appropriated is not subject to this rule, and the appropriator is given ample protection by the provision that only surplus water may be appropriated by such companies.

Defendants contend that under sec. 25 of the act above referred to, the complainant company is prohibited from appropriating any water from the Rio Grande between the 15th day of February and the 15th day of October in each year. While I do not deem it necessary to pass upon this question for the purpose of this case, I have given the matter consideration and have arrived at the conclusion that the Rio Grande is not within the operation of that section.

The act of 1887, section 25, being section 492 of the Compiled Laws of 1897, provides in substance that no corporation organized for taking water for the purpose of irrigation or other purposes shall have any right to divert the use of the natural flow of water or any stream which by the law of 1854 had been declared a public acequia, for any use whatever, between the 15th day
105 of February and the 15th day of October of each year unless with unanimous consent of every person holding agricultural and cultivated lands under such stream or public acequia, etc.

A reference to the session acts of 1854 will show that there was no statute passed at that session of the legislature on the subject referred to. In 1852 the act of January 7th was passed, which may be found in the Compiled Laws of 1865, page 20, in full; all the material sections of this act were also compiled in 1884, beginning with section 6 of the Compiled Laws of 1884, in fact section 6 is the only material section so far as the present inquiry is concerned. This section is also carried into the compilation of 1897, as section 6. As there was no act of 1854, as referred to in the act of 1897, it is clear that this was a mistake; the act of 1852 was evidently intended. In 1854 the Davenport compilation of the statutes was made and the act of 1852 was carried into that compilation in full. See revised Code of New Mexico, page 86. This accounts for the mistake; reference was evidently had to that code instead of the session act.

A consideration of the section (6) above referred to, together with the entire act, will show that it could have no application whatever to a stream like the Rio Grande; what is meant by this section is such ditches, acequias or natural water-courses used as acequis, as have become the subject of private or community ownership, and upon which labor is expended for the purpose of appropriating the water therefrom and using the same to irrigate the lands of the persons so working thereon.

The defendants seek to defend, not only on behalf of themselves, but also on behalf of their grantors, ancestors and others "to
106 the number of many thousands," and allege that for centuries, in some instances, their grantors and ancestors had used the waters of the Rio Grande and had secured rights under the laws of Spain and Mexico, guaranteed to them by the treaty of Guadalupe Hidalgo, to the full extent of the flow of said river during the planting and growing season, etc.

As to the first of these allegations of the answer, I must decline to consider the rights of other than the defendants and those interested along the line of the proposed canal. The court cannot consider the rights of all appropriators of water from the Rio *Rio* Grande below the terminus of the proposed canal. First—because they are not parties to the suit, and therefore not subject to the orders, nor bound by the decision of this court. Second—the testimony of Mr. Harroun as to the flow of water shows that fully as much water flows in the river at San Marcial, far below Albuquerque, as flows at Albuquerque and above during most of the year, and sometimes much more, all of which tends to show that there are tributaries contributing waters to the lower part of the river that must be taken into account when the rights of appropriators below the proposed canal are determined. If the rights of appropriators below are affected by the diversion of water through the proposed canal, the courts are open for the protection of their rights. This case involves the right of eminent domain over the defendants' land, or of land-owners along the line of the canal, and as to that issue parties below the terminus of the ditch have no interest. The rights of parties to the

use of water below the canal cannot be affected by this decision and will not be considered.

107 Upon the other allegations of defendants as to treaty rights, I am of the opinion that the lands of citizens of New Mexico, since the cession, are subject to the operation of the law of eminent domain under the laws of the United States, and the States and Territories thereof, and not exempt therefrom by virtue of the treaty of Guadalupe Hidalgo. The appropriation and distribution of water must be governed by similar laws, inasmuch as the United States has adopted its own system of water rights and adjusted the system to the different sections of the country as necessity required, and the laws of the States and Territories are in harmony therewith. These laws must govern wherein they differ from the treaty provisions, and wherein they are harmonious, treaty provisions need not be considered. The laws of the United States and the States and Territories are ample for the protection of the rights of appropriators of water in this Territory, and remedies for impairment or destruction of such rights, are adequate also.

It is insisted that the complainant company does not intend to construct a reservoir, or reservoirs, for the purpose of storing surplus water, nor has it the means to do so. The statute certainly authorizes such companies to do so; the charter of this company provides for such construction; Mr. Childers, one of the incorporators, testifies that it is the intention of the company to construct reservoirs if it becomes necessary to do so; and Mr. Harroun's testimony is to the same effect, and further, that it is feasible to do so. In view of this evidence, and the fact that other evidence in the case shows that the complainants are aware that the river may not contain surplus water at all times, I cannot accept the view that com-

108 plainants do not intend to construct reservoirs for the storage of water; that they have not the means to do so is not a material matter at this time.

The fact that the headgate of the proposed canal is situated above the mouths of the other ditches is not material, as the rights of prior appropriators will be the same in any event.

It is true that the proposed canal may cross the line of one or more of the old ditches, but the construction of the canal cannot be prohibited for this reason. It is within the knowledge of this court that the ditches now existing cross each other without affecting the flow of the water. Some of the ditches in the vicinity of Albuquerque cross each other, as shown by the plat filed as evidence. Of course, the complainant company will not be allowed to destroy the present ditches or in any way diminish the flow of water lawfully diverted by or flowing through the old ditches. If, however, the canal can be constructed without injury to the present capacity of the old ditches, it may lawfully be done. The remedy that the law provides cannot be invoked until injury is attempted or threatened, but the construction of the canal alone is not necessarily an injury, as it may not affect the rights of prior appropriators in the slightest degree.

The full scope of the defense in this case is to the effect, that all

of the water of the Rio Grande had been legally appropriated before the inception of complainant's rights. The logical conclusion from this would be, that there can be no further diversion of water from this stream, no further ditches or canals constructed, and no further lands brought under cultivation. I cannot so conclude from the evidence in this case, nor from the law of the case, as I understand it.

109 I am of the opinion that the complainant company had a legal right to construct the proposed canal at the time it attempted to do so, and for that purpose they were authorized to enter upon, examine and survey so much of the lands of the defendants as were necessary for the construction of said canal. That the defendants had no right to obstruct or interfere with the agents of the complainants in the proscution of their work. That the injunction was properly granted and continued in force, and that the same ought to be made perpetual by the order of this court.

It is therefore ordered that the decree rendered by the court below, be affirmed, and that a decree be entered accordingly, and that appellee have and recover its costs expended in this behalf, to be taxed.

WILLIAM J. MILLS,
Chief Justice.

We concur:—
FRANK W. PARKER, *A. J.*
CHARLES A. LELAND, *A. J.*

Judge McFie, before whom the case was tried below, did not sit in this case.

110 TERRITORY OF NEW MEXICO, } ss:
Supreme Court, }

I, Jose D. Sena, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing 109 pages contain a full, true and perfect copy of the record and proceedings, pleadings and opinion filed in the above-entitled cause which is transmitted to the Supreme Court of the United States, in accordance with an appeal hereinbefore granted herein.

Witness my hand and the seal of the supreme court of the Territory of New Mexico, this the 6th day of June, A. D., 1900.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk of the Supreme Court of the Territory of New Mexico.

111 In the Supreme Court of the United States, October Term, A. D. 1900.

TOMAS C. GUTIERRES, PEDRO GRIEGO Y APODACA, JESUS ZAMORA, Ben.to Jaramillo, and Leon Montoya, Appellants,
vs.
ALBUQUERQUE LAND & IRRIGATION COMPANY, Appellee.

Assignment of Errors.

Come now the said appellants, and show to the court here that in the record, proceedings and judgment of the supreme court of the Territory of New Mexico in the above-entitled cause there is manifest error to the prejudice of these appellants, in this, to wit:

I.

The court erred in affirming the judgment of the district court of Santa Fé county because the facts found by the said district court are insufficient to support the said judgment.

II.

The court erred in affirming the conclusion of law of the said district court, as follows:

"That the plaintiff, by the filing of its articles of incorporation with the secretary of the Territory of New Mexico and complying with the provisions of the act under which it is inforporated, has acquired a right to construct its canal and reservoirs to divert through its proposed canal surplus and unappropriated waters flowing in the Rio Grande and that such right of eminent domain does not depend upon the ownership of lands by plaintiff or the employment of plaintiff prior to the construction of its canal by owners of lands to carry water for such owners."

III.

The court erred in refusing to hold that the act under which the appellee is incorporated as construed by the district court of Santa Fé county, is in contravention of the legislation of Congress
112 on the same subject, especially the act of March 3rd, 1877, entitled "An act to provide for the sale of desert land in certain States and Territories," and the acts of Congress amendatory thereof.

IV.

The court erred in affirming the conclusion of law of the said district court as follows:

"That the defendants, at the time of the filing of the complaint herein, unlawfully obstructed the plaintiff in the exercise of powers lawfully conferred upon it by the act under which it is incorporated."

V.

The court erred in affirming the conclusion of law of the said district court as follows:

"That the defendants do not and cannot in this action lawfully represent the rights of such persons claiming a right to the use of the waters of the Rio Grande, by prior appropriation, when the appropriation of such persons was effected at a point below the mouth of the proposed canal of plaintiff."

VI.

The court erred in affirming the conclusion of law of the said district court as follows:

"That the defendants cannot lawfully set up in this action any rights secured to them and their associates or their predecessors in title by the treaty of Guadalupe Hidalgo and that the allegations of paragraph ten of the answer of defendants with reference to the treaty rights of defendants are immaterial."

VII.

The court erred in affirming the judgment of the district court of Santa Fé county refusing to grant to appellants the relief demanded in their cross-complaint.

Wherefore the said appellants pray that the said record may be seen and examined by this honorable court; that the errors of the said supreme court of the Territory of New Mexico and of the
113 said district court of Santa Fé county in said Territory of New Mexico may be corrected; that the judgment of the said supreme court of the Territory of New Mexico may be annulled and that these appellants may be restored to all things which they have lost by reason thereof.

NEILL B. FIELD,
Attorney for Appellants.

[Endorsed:] No. — Territory of New Mexico. United States Supreme Court. Tomas C. Gutierres, *et als.*, *vs.* Albuquerque Land and Irrigation Company. Assignment of errors. Neill B. Field, Albuquerque, N. M., attorney for appellants.

Endorsed on cover: File No. 17,802. New Mexico Territory supreme court. Term No. 85. Tomas C. Gutierres, *et al.*, appellants, *vs.* The Albuquerque Land and Irrigation Company. Filed June 16th, 1900.

In the Supreme Court

OF THE

United States.

OCTOBER TERM, A. D. 1901.

No. 85.

Tomas C. Gutierres, et al.,
Appellants,
vs.
Albuquerque Land & Irrigation Company.

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

This case is brought into this Court under the second section of the Act of March 3, 1885, (*23 Stats., 443*), it being a case wherein is called in question the "validity of a treaty" of the United States and "of an authority exercised under the United States." The appellee company is incorporated under an act of the legislative assembly of the Territory of New Mexico, approved February 24, 1887, the material portions of which are here set out:

> "Section 1. Any five persons who may desire to form a company for the purpose of constructing and maintaining reservoirs and canals, or ditches and pipe lines, for the purpose of supplying water for the purpose of irrigation, mining manufacturing, domestic and other public uses, including cities and towns, and for the purpose of colonization and the improvement of lands in connection therewith; for either or both of said objects, either jointly or separately, shall make and sign articles of incorporation, which shall be acknowledged before the secretary of the territory, or some person authorized by law to take acknowledgment of conveyances of real estate, and when so acknowledged, such articles shall be filed with such secretary.
>
> "Sec. 2. Such articles shall set forth:
>
> 1. The full names of the incorporators, and the corporate name of such company.
>
> 2. The purpose or purposes for which such company is formed; and if the object be to construct reservoirs and canals, or ditches and pipe lines for any of the pur-

poses herein specified; the beginning point and terminus of the main line of such canals and ditches and pipe lines; and the general course, direction and length thereof shall be stated.

3. The amount of the capital stock and the number of shares as definitely as practicable.

4. The term of existence of the company, which shall not exceed fifty years.

5. The number of directors, and the names of those who shall manage the business of the company for the first year.

6. The name of the city or town and county in which the principal place of business of the company is to be located.

"Sec. 17. Corporations formed under this act for the purpose of furnishing and supplying water for any of the purposes mentioned in section one, shall have, in addition to the powers hereinbefore mentioned, rights as follows:

1. To cause such examination and surveys for their proposed reservoirs, canals, pipe lines and ditches to be made as may be necessary to the selection of the most eligible locations and advantageous routes, and for such purpose, by their officers, agents and servants to enter upon the lands or water of any person, or of this territory.

2. To take and hold such voluntary grant of real estate and other property, as shall be made to them in furtherance of the purposes of such corporation.

3. To construct their canals, pipe lines or ditches upon or along any stream of water.

4. To take and divert from any

stream, lake or spring the surplus water, for the purpose of supplying the same to persons, to be used for the objects mentioned in section one of this act, but such corporations shall have no right to interfere with the rights of, or appropriate the property of any persons except upon the payment of the assessed value thereof, to be ascertained as in this act provided: And provided, further: That no water shall be diverted, if it will interfere with the reasonable requirements of any person or persons using or requiring the same when so diverted.

5. To furnish water for the purposes mentioned in section one, at such rates as the by-laws may prescribe; but equal rates shall be conceded to each class of consumers.

6. To enter upon and condemn and appropriate any lands, timber, stone, gravel, or other material that may be necessary for the uses and purposes of said companies.

"Sec. 25. That no incorporation of any company or companies to supply water for the purposes of irrigation and other purposes, shall have any right to divert the usual and natural flow of water of any stream which by the law of 1854 has been declared a public acequia, for any use whatever, between the fifteenth day of February and the fifteenth day of October of each year, unless it be with the unanimous consent of all and every person holding agricultural and cultivated lands under such stream or public acequia, and to be irrigated by the water furnished by said stream or public acequia, and that no incorporation of any company or com-

panies shall interfere with the water rights of any individual or company, acquired prior to the passage of this act."

Laws of 1887, page 29.

Compiled Laws of 1897, ss. 462, et seq.

It is claimed by appellants that so much of the act above quoted as purports to authorize, and as is held by the court below to authorize, the appellee to divert the "surplus" waters of the Rio Grande through its canal, is in direct conflict with the legislation of Congress on the same subject.

The legislation of Congress to which reference is made, is here set out:

"Sec. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

"Sec. 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights,

as may have been acquired under or recognized by the preceding section."

Rev. Stats. U. S., Secs. 2339 and 2340.

Section 1, of the act of 3d of March, 1877, known as the Desert Land Act:

"That it shall be lawful for any citizen of the United States, or any person of requisite age 'who may be entitled to become a citizen, and who has filed his declaration to become such,' and upon payment of twenty-five cents per acre—to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter.

Provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres, shall depend upon *bona fide* prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation: *and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights.*"

1st Supp. Rev. Stats., 137.

Section 4, of the act of 3d of March, 1891, as follows:

"Sec. 4. That at the time of filing the declaration hereinbefore required the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections, or fractional parts of sections, of desert lands, may associate together in the construction of canals and ditches for irrigation and reclaiming all of said tracts, and may file a joint map or maps, showing their plan of internal improvements."

1 Supp. Rev. Stats., page 940.

Section 18, of the same act, may shed light upon the subject.

"Sec. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior, a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone, necessary for the construction of such canal or ditch.

> Provided, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation.
>
> And the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories."
>
> *1st Supp. Rev. Stats., page 946.*

It is also claimed by appellants that this legislation invades rights guaranteed by Articles VIII and IX of the treaty, commonly known as the treaty of Guadalupe Hidalgo, which contains the following provisions:

> "In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guarantees equally ample as if the same belonged to citizens of the United States."
>
> "Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and

in the mean time shall be maintained and protected *in the free enjoyment of their liberty and property*, and secured in the free exercise of their religion without restriction."

It is further urged by appellants that this legislation is prohibited by Section Seven of the Organic Act of the Territory as follows:

> "Sec. 7. And be it further enacted, that the legislative power of the Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands of other property of residents. All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect." (9 *Stats.*, 449).

Appellants further insist that this legislation is not a reasonable exercise of the grant of legislative power contained in the section above quoted, but on the contrary that it is so unreasonable that this court may declare it void, even if the other objections urged against it are not well founded.

These various questions are presented upon this record thus:

The appellee, having filed articles of incorporation under the Territorial statute (*Transcript, p. 9-10*), was proceeding to make a survey of a pro-

posed route for its canal when its engineering corps was driven off the lands of appellants and their associates by force, whereupon appellee filed its complaint in the district court of Bernalillo county, and obtained a temporary injunction restraining the appellants by name and their "agents, confederates and assistants,"

> "from hindering, preventing, obstructing and delaying the plaintiff, the Albuquerque Land and Irrigation Company, its agent, servants and employes, from proceeding with the examination and survey by obstructing, preventing and hindering their entrance upon and along lands lying and being at, near and along a proposed route for a canal, ditch and pipe line, beginning at a point on the east bank of the Rio Grande south or near the Indian Pueblo of San Felipe in the County of Bernalillo and Territory of New Mexico, and the terminus of said main line to be at a point south near the railway bridge of the Atchison, Topeka and Santa Fe Railway, at Isleta, also in said County of Bernalillo. The general course and direction of said line being southerly, east of the east bank of the said river along and under the foothills through the city of Albuquerque and the length thereof estimated to be thirty-five miles, more or less."

In its complaint, appellee grounded its right to enter upon the lands of appellants, to exercise the power of eminent domain, in other words, solely upon the allegations that it was incorporated under the act referred to and that it intended in good faith to construct a canal.

Appellants by their answer justify their refusal to permit the survey of their lands for reasons some of which are eliminated on this review but which may be summarized thus:

First: That appellee is not the owner of any irrigable lands along the line of the proposed canal, nor is it the owner of any reservoir site or other place for the holding or storing of water, nor is it the owner of any water-right by or under which it can obtain water for its proposed canal, when completed; nor has it any employment to carry or deliver water through its canal, when completed, to any persons having a right to use the same for the purpose of irrigating lands owned or occupied by them.

Second: That appellee intends to divert the waters of the Rio Grande through its canal for the purpose of selling said water for speculative purposes and for pecuniary profit and will claim title to all waters which may be diverted through its said proposed canal.

Third: That appellee has not the capital necessary to pay for the right of way for its canal, even if it had the right to secure such right of way by condemnation. (Eliminated.)

Fourth: That appellants and their associates, to the number of many thousands of people, and their several ancestors, grantors and predecessors in title, for more than fifty years, have used the waters of the Rio Grande to the extent of their entire flow and there are no surplus waters of the

said Rio Grande subject to be diverted through the proposed canal of appellee. (Eliminated as to the claim that there are no surplus waters by courts findings of fact.)

Fifth: That the Rio Grande is one of the streams referred to in Section XXV of the act under which the appellee is incorporated and that the waters of said Rio Grande are within the restrictions of said section and are therefore not subject to be diverted by appellee. (Eliminated.)

Sixth: That by the laws of Spain and Mexico the predecessors in title of the appellants had a vested right to use all of the waters of the Rio Grande for purposes of irrigation, that such right was protected and guaranteed by the treaty of Guadalupe Hidalgo and is not subject to be impaired by any law of the Territory of New Mexico.

Seventh: That by the laws of the United States, in force at the time of the passage of the act under which appellee is incorporated, no title to the waters of any natural stream, not navigable, could be acquired for any purpose whatever, but only a right of use of such waters for irrigating, mining or manufacturing may be acquired. That the right to divert the natural flow of the waters of any such stream for purposes of irrigation, is incident to the ownership or occupation of lands and that the right to divert such waters for purposes of sale cannot be acquired.

The appellants reiterated the affirmative allegations of their answer in a cross-complaint against appellee by which they sought to enjoin the appel-

lee from attempting to exercise the right of eminent domain as to their lands and the lands of their associates. The issues being made up by an answer to the cross-complaint and by replications filed by both parties, the case was sent on change of venue to Santa Fe county and was there tried by the district judge without the intervention of a jury. A large amount of testimony was taken, chiefly directed to the question of the existence of surplus and unappropriated waters of the Rio Grande but this evidence was not before the supreme court of the Territory and is, of course, not brought here.

The findings of fact made by the trial court were adopted by the supreme court and will be found on pages 34, 35 and 36 of the transcript. These findings of fact are not responsive to all of the issues in the case but we may concede that they tend to establish the existence of "surplus" waters in the Rio Grande within the meaning of the act in question, which concession renders it unnecessary to consider the first thirteen of said findings.

As the case in this court is conceived by counsel for appellants, we are concerned with only the fourteenth, fifteenth, sixteenth and eighteenth findings. They are as follows:

XIV.

> The court finds that there is no evidence that plaintiff relies on any source of water supply other than the Rio Grande or that the proposed canal of plaintiff is

expected or intended to receive and distribute stored waters.

XV.

That the plaintiff is not the owner of any lands along the line of its proposed canal or elsewhere.

XVI.

That there is no evidence that plaintiff has any contract with or employment by any person who is the owner of lands irrigable from said proposed canal for the conduct of water upon any such lands, or that any owner of lands not now irrigated from existing acequias, desires or intends to irrigate such lands from plaintiff's canal when completed.

XVIII.

That some of the defendants and some of their associates are the owners of lands through which the plaintiff proposes to construct its canal.

(*Trans., pp. 35-36*).

From the facts found the trial court concluded as matter of law, and the supreme court affirmed these conclusions, as follows:

I.

That the plaintiff corporation is entitled to exercise the power of eminent domain.

II.

That the plaintiff, by the filing of its articles of incorporation with the secretary of the Territory of New Mexico and complying with the provisions of the act under

which it is incorporated, has acquired a right to construct its canal and reservoirs to divert through its proposed canal surplus and unappropriated waters flowing in the Rio Grande and that such a right of eminent domain does not depend upon the ownership of lands by plaintiff or the employment of plaintiff prior to the construction of its canal by owners of lands to carry water for such owners.

III.

That the defendants, at the time of the filing of the complaint herein unlawfully obstructed the plaintiff in the exercise of powers lawfully conferred upon it by the act under which it is incorporated.

IV.

That the defendants do not and cannot in this action lawfully represent the rights of such persons claiming a right to the use of the waters of the Rio Grande, by prior appropriation, when the appropriation of such persons was affected at a point below the mouth of the proposed canal of plaintiff.

V.

That the defendants cannot lawfully set up in this action any rights secured to them and their associates or their predecessors in title by the treaty of Guadalupe Hidalgo and that the allegations of paragraph ten of the answer of defendants with reference to the treaty rights of defendants are immaterial.

VI.

That the plaintiff is entitled to the relief demanded in the complaint, includ-

ing a perpetual injunction as prayed for.

VII.

That defendants are not entitled to any part of the relief demanded in their cross-complaint but the same should be dismissed.

(*Trans., pp. 36-37*).

Both the trial court and the supreme court refused to give any consideration to the rights set up by appellants under the treaty of Guadalupe Hidalgo. From the opinion sent up with the transcript it appears that both courts supposed appellants to be contending for the proposition that lands which were held in private ownership, prior to the treaty of cession, were not subject to condemnation for public uses under the laws of the Territory.

I quote from the opinion:

"Upon the other allegations of defendants as to treaty rights, I am of the opinion that the lands of citizens of New Mexico, since the cession, are subject to the operation of the law of eminent domain under the laws of the United States, and the States and Territories thereof, and not exempt therefrom by virtue of the treaty of Guadalupe Hidalgo. The appropriation and distribution of water must be governed by similar laws, inasmuch as the United States has adopted its own system of water rights and adjusted the system to the different sections of the the country as necessity required, and the laws of the States and Territories are in harmony therewith. These laws must govern wherein they differ from the treaty

provisions, and wherein they are harmonious, treaty provisions need not be considered. The laws of the United States and the States and Territories are ample for the protection of the rights of appropriators of water in this Territory, and remedies for impairment or destruction of such rights, are adequate also."

(*Trans., p. 60*).

The rights sought to be set up, which are disposed of, are:

X.

Further answering these defendants aver that they are advised by counsel and believe and therefore charge that by the laws of the Republic of Mexico in force at the time of the acquisition of the Territory of New Mexico by the United States of America (as well as by the laws of Spain when the present Territory of New Mexico was subject to the dominion of the Spanish crown) the owners of lands adjacent to any stream of water not navigable were permitted to appropriate the waters thereof or so much of said waters as might be necessary for the irrigation of their lands and for their animals and other domestic purposes and by such appropriation of said water the owners of such lands acquired a right to divert the same from their usual and natural course and to apply the same to the irrigation of their lands and for the domestic purposes incident to cultivation of the soil. And these defendants further aver that their ancestors, grantors and predecessors in title, were owners and proprietors of lands adjacent to the Rio Grande at the time of the acquisition of the Territory of New Mexico by the United States of America and had

acquired, prior to such acquisition of the said Territory of the United States, the right to irrigate their lands with the waters of the Rio Grande and had acquired a vested right to use and divert the entire flow of the said waters of the Rio Grande through ditches or acequias constructed and maintained by them for the purpose of irrigating their said lands, nearly all of which lands are now owned by these defendants and their associates and these defendants are advised by counsel and believe and therefore charge that the right to the use of the waters of the Rio Grande so acquired by the ancestors, grantors and predecessors in title, of these defendants, under the laws of Spain or of the Mexican Republic, are appurtenant to the said lands to the irrigation of which the said waters were so applied and as such pass by the conveyance or descent of the said lands and are fully guaranteed and protected by the terms of the treaty between the United States of America and the Republic of Mexico, known as the treaty of Guadalupe Hidalgo, and are not subject to be impaired or divested by any law of the United States or of the Territory of New Mexico and these defendants therefore aver that any law of the Territory of New Mexico which purports in any manner to impair or restrict any of said rights is void and of no effect, and no person or corporation can by virtue of any such pretended law, interfere with the rights of these defendants and their associates, so acquired by their ancestors, grantors and predecessors in title under the laws of Spain and Mexico, as hereinbefore alleged and set forth.

(*Trans., pp. 15–16.*)

Appellants have never contended that their lands may not be taken for public use under the power of eminent domain because of any stipulations of the treaty relied on, neither do they contend that Congress may not nullify a treaty. They do contend, however, that the legislature of the Territory of New Mexico can not do so. They insist that when, in a court of justice, a litigant on one side sets up a right, claimed under an act of a territorial legislature and a litigant on the other side makes the contention that such act invades a right guaranteed by a treaty of the United States, it devolves upon the court to examine the act and the treaty and to determine whether or not the contention thus made is well founded, and, if such contention be well founded, to declare the act of the legislature void. They further contend that for the purpose of this review, every fact alleged in paragraph ten of the answer above quoted, which is well pleaded, must be taken as true.

The conclusion of law numbered four as follows:

> IV.
>
> That the defendants do not and cannot in this action lawfully represent the rights of such persons claiming a right to the use of the waters of the Rio Grande, by prior appropriation, when the appropriation of such persons was effected at a point below the mouth of the proposed canal of plaintiff.
>
> (*Trans., p. 36.*)

Appears to find its support in the following language of the opinion:

> "The defendants seek to defend, not only on behalf of themselves, but also on behalf of their grantors, ancestors and others 'to the number of many thousands,' and allege that for centuries, in some instances, their grantors and ancestors had used the waters of the Rio Grande and had secured rights under the laws of Spain and Mexico, guaranteed to them by the treaty of Guadalupe Hidalgo, to the full extent of the flow of said river during the planting and growing season, etc.
>
> As to the first of these allegations of the answer, I must decline to consider the rights of other than the defendants and those interested along the line of the proposed canal. The court cannot consider the rights of all appropriators of water from the Rio Grande below the terminus of the proposed canal. First—because they are not parties to the suit, and therefore not subject to the orders, nor bound by the decision of this court. Second—the testimony of Mr. Harroun as to the flow of the water shows that fully as much water flows in the river at San Marcial, far below Albuquerque, as flows at Albuquerque and above during most of the year, and sometimes much more, all of which tends to show that there are tributaries contributing waters to the lower part of the river that must be taken into account when the rights of appropriators below the proposed canal are determined. If the rights of appropriators below are affected by by the diversion of water through proposed canal, the courts are open for the protection of their rights. This case in-

> volves the right of eminent domain over the defendants' land, or of land-owners along the line of the canal, and as to that issue parties below the terminus of the ditch have no interest. The rights of parties to the use of water below the canal cannot be affected by this decision and will not be considered." (*Trans., pp. 59-60.*)

It is submitted that this is an adjudication that persons interested in the waters of the Rio Grande below the mouth of appellee's canal cannot be affected by the construction of the canal and involves the assumption that as much water will continue to flow in the natural channel of the river after the diversion proposed to be made by appellee is accomplished, as before. As lower riparian proprietors they had a right to be heard as to any diversion of waters made above them on the stream. The restraining order is broad enough to embrace these persons whose rights were refused consideration. But this conclusion is erroneous for another and much more serious reason, *i. e.*, it assumes that appellee may be invested with power to condemn lands for the right of way for its canal, even though it is without power to divert the waters of the Rio Grande through the canal when constructed. Appellants contend that appellee could not be invested by the territorial legislature with power to construct the canal which it proposes to construct, unless it was also invested with power to divert water through that canal; that the right of eminent domain attempted to be conferred by the act was in this sense an entire right and that the existence of the right to take

the initial step of examination and survey depends upon the existence of the right to do the ultimate act of diverting water through the canal when constructed, because the canal without water could not be a public utility but on the contrary would necessarily be a public nuisance.

Attention is invited to the fact that so far as disclosed by this record the owners of all of the land susceptible of irrigation by means of the canal of appellee are resisting its construction. So far as appears by this record there is not a foot of land susceptible of irrigation by means of appellee's proposed canal, which is not already sufficiently supplied with water through existing community ditches.

There are some expressions in the opinion of the court to the effect that there are seven thousand acres of irrigable land which the present ditches are unable to serve, but there is no finding by the court to that effect and it is settled that the opinion may not be looked to to eke out the findings of fact.

In its answer to the cross complaint (as well as in its reply to the answer of appellants) appellee set up:

IV.

> Plaintiff and cross-defendant denies that it is not the owner or occupier of any lands which can be irrigated with water conducted through its proposed canal or ditch, and denies that it is not the owner of any water right or of any water with

which it may conduct the business for which it was organized; and denies that it intends to solely and entirely rely upon such ownership of the waters of the Rio Grande as it can acquire by the construction and maintenance of its proposed canal or ditch, and its diversion of such waters by means thereof; but alleges that the owners of at least eight hundred and fifty acres of land now irrigated by water taken from said river and who have had the absolute right to take water from such river as appurtenant to said land, have entered into contracts with the promoters and organizers of the plaintiff company to take water for the irrigation of their lands from said company so soon as its said ditch shall be constructed. And plaintiff and cross-defendant further answering, alleges that it is the beneficial owner of said contracts and that the promoters with whom such contracts were made have agreed to assign and set over same to the plaintiff and cross-defendant whenever it demands the assignment of the same; and plaintiff and cross-defendant further alleges that many other persons, owners of lands now irrigated by water taken from said river, are ready and willing and offer to take water from said company out of said ditch when it is constructed, for the purpose of irrigating lands now being cultivated by them. And further answering, alleges that the said company was organized not for speculative purposes, but for the purpose of developing and conserving the water now going to waste through the channel of said river, and not for the purpose of gain and speculation; and denies that it will dispose of any water

> which may pass through its proposed canal or ditch to consumers to be used for any purpose they may see fit to apply the same; and on the contrary, alleges, that the objects and purposes of the corporation are for the purpose of irrigation and improvement and colonization of lands; and denies that it proposes to divert and appropriate water out of said river purely for speculation; and alleges that it is a public incorporation, incorporated for the purpose of supplying water and for the general use of such owners of irrigable lands as see fit to patronize it, and that such appropriation is under the law of beneficial use. (*Trans., p. 26*).

But the fourteenth, fifteenth and sixteenth findings of fact are to the contrary of these allegations.

Appellants do not ask the court to review the action of the supreme court of the Territory in so far as it is held that the Rio Grande is not one of the streams referred to in Section XXV of the act in question nor do they think that some other matters relied on by them in the answer, as to which the decision of the trial court was adverse upon the facts, are before this court for review, but they submit that the questions presented by this record are:

First: Is the act of the legislative assembly of the Territory of New Mexico, approved February 24th, 1887, a valid exercise of the legislative power granted by Congress to the legislative assembly of the Territory of New Mexico?

Second: If the said act is otherwise a valid

exercise of legislative power, is it not void because in conflict with the legislation of Congress on the same subject?

Third: Is not the act in question in conflict with the treaty commonly known as the "treaty of Guadalupe Hidalgo" and therefore void?

Fourth: Is not the act in question void because not a reasonable exercise of the legislative power granted by Congress to the Territorial legislature?

Fifth: Could the trial court properly exclude from consideration the rights of those persons who initiate their diversion of water from the Rio Grande below the mouth of appellee's proposed canal but who are associated with appellants in resisting the exercise by appellee of the power of eminent domain, and who are embraced in the very terms of the restraining order issued at the instance of appellee?

Appellants have filed the following assignment of errors:—

I.

The court erred in affirming the judgment of the district court of Santa Fe county because the facts found by the said district court are insufficient to support the said judgment.

II.

The court erred in affirming the conclusion of law of the said district court, as follows:

"That the plaintiff, by the filing of its

articles of incorporation with the secretary of the Territory of New Mexico and complying with the provisions of the act under which it is incorporated, has acquired a right to construct its canal and reservoirs to divert through its proposed canal surplus and unappropriated waters flowing in the Rio Grande and that such right of eminent domain does not depend upon the ownership of lands by plaintiff prior to the construction of its canal by owners of lands to carry water for such owners."

III.

The court erred in refusing to hold that the act under which the appellee is incorporated as construed by the district court of Santa Fe county, is in contravention of the legislation of Congress on the same subject, especially the act of March 3d, 1877, entitled "An act to provide for the sale of desert lands in certain States and Territories," and the acts of Congress amendatory thereof.

IV.

The court erred in affirming the conclusion of law of the said district court as follows:

"That the defendants, at the time of filing of the complaint herein, unlawfully obstructed the plaintiff in the exercise of powers lawfully conferred upon it by the act under which it is incorporated".

V.

The court erred in affirming the conclusion of law of the said district court as follows:

"That the defendants do not and cannot in this action lawfully represent the rights of such persons claiming a right to the use of the waters of the Rio Grande, by prior appropriation, when the appropriation of such persons was effected at a point below the mouth of the proposed canal of plaintiff".

VI.

The court erred in affirming the conclusion of law of said district court as follows:

"That the defendants cannot lawfully set up in this action any rights secured to them and their associates or their predecessors in title by the treaty of Gudalupe Hidalgo and that the allegations of paragraph ten of the answer of defendants with reference to the treaty rights of defendants are immaterial."

VII.

The court erred in affirming the judgment of the district court of Santa Fe county refusing to grant to appellants the relief demanded in their cross-complaint.

In support of these assignments of error they submit the following:

POINTS AND AUTHORITIES.

I.

The act in question interferes with the primary disposal of the soil and is forbidden by the letter of the organic act.

The validity of this act as a whole must be tested by the validity of the grant contained in sub-sections 4, 5 and 6 of section 17 as follows:

"Corporations formed under this act * * shall have in addition to the powers hereinbefore mentioned, rights as follows: * * * * * * * * *

4. To take and divert from any stream, lake or spring the surplus water, for the purpose of supplying the same to persons, to be used for the objects mentioned in section one of this act, but such corporations shall have no right to interfere with the rights of, or appropriate the property of any persons except upon the payment of the assessed value thereof, to be ascertained as in this act provided: And provided, further, that no water shall be diverted, if it will interfere with the reasonable requirements of any person or persons using or requiring the same when so diverted.

5. To furnish water for the purposes mentioned in section one, at such rates as the by-laws may prescribe; but equal rates shall be conceded to each class of consumers.

6. To enter upon and condemn and appropriate any lands, timber, stone, gravel, or other material that may be necessary for the uses and purposes of said companies."

This is clearly an attempt by the legislature to grant to corporations created under this act the right to take the unappropriated waters of all streams in the Territory of New Mexico and to sell the same for pecuniary profit, with the single limitation, that uniform prices shall be charged to each class of consumers.

Unless the Territorial legislature had power

to make this grant the whole purpose of the act is defeated and the act must be held void.

It is not conceivable that the Territorial legislature would have attempted to authorize the creation of corporations for the purposes declared by this act without some such provision as this. Indeed, it may safely be said that all other parts of the act are so connected with and dependent upon this that the legislature intended them to be effective as a whole and would not otherwise have passed the act in question. (*Pollock vs. Farmers Loan & Trust Co., 158 U. S., 636.*)

Upon what authority is it contended that the Territorial legislature could make such a grant? Certainly the waters thus attempted to be granted away are not the property of the Territory for it is a matter of which this court takes judicial notice that all waters and all lands within the territory ceded by the Republic of Mexico, not held in private ownership at the time of the cession, became the property of the United States. The court further takes judicial notice of the conditions existing in the arid region and that agriculture cannot be successfully carried on in the valley of the Rio Grande without irrigation. Also that the United States are the owners of lands in the valley of the Rio Grande which are subject to entry under the public land laws and that such lands, when irrigable, are of great value, but without irrigation are worthless.

All of these facts appear to be easily within the rule laid down by this court in the case of

United States vs. The Rio Grande Dam Co., 174 U. S., 695.

In *Lux vs. Haggin*, (*69 Calif., 255.*) a great and leading case on water rights in California, the supreme court of that state said:

> "Would not a state law which, in advance of the grant, should attempt to take from the grantee the flow of the stream, acquired from or sought to be conveyed by the United States, and confer the waters on one who has acquired no right to them from the United States, be an interference with the 'primary disposal' of the public lands?
>
> We do not find it necessary to say that the prospective provisions of the code would violate the obligation of a contract. But when the state is prohibited from interfering with the primary disposal of the public lands of the United States, there is included a prohibition of any attempt on the part of the state to preclude the United States from transferring to its grantees its full and complete title to the land granted, with all its incidents."
>
> "The same rule must apply to homesteaders, pre-emptioners, and other purchasers under the laws of the United States. To say that hereafter the purchaser from the United States shall not take any interest in water flowing to, or in the trees on, or the mines beneath, the surface,—but others of our citizens shall have privilege of removing all these things,—is to say that hereafter the United States shall not sell the water, wood, or ores." * * *pp. 372-3.*
>
> "The state has granted the waters

running to its own lands by authorizing the diversion of waters from its lands, and doubtless such grantees acquire the state property in the waters whenever the state has a property in the waters at the time of the grant." * * *p. 374.*

"The right to the use of the waters as part of the land once vested in its private guarantee, the state has no power to divest him of the rights, except on due compensation." * * *pp. 374-5.*

"The right of the prior occupant of the land or water on the public domain of the United States being recognized by the courts, it cannot be doubted that the legislature had power to establish or change a rule of evidence according to which the prior occupation is to be proved. With reference to appropriation of water on public lands, for example, the legislature had power to require that the notice of appropriation should contain certain statements, that work should be commenced within a definite time, and be completed within a named period, etc. *Neither the state legislature nor the state courts have any independent power to interfere with the primary disposal of the public lands of the United States, nor to detract from the estates in such lands granted under the laws of the United States.* Nevertheless, whilst a body of land, the waters thereon shall remain a portion of the public lands of the United States, the right of mere possessors, or asserted possessors, will continue to be determined, as between themselves, by the law applicable to such controversies as the same was laid down by our courts previous to the code enactments, except so far as it may have been modified by the provisions of the code.

> The legislation of the state (with reference to occupations on the public lands), like the judicial decisions, is based on the presumption that the general government has permitted the occupation of water, or of land with the water thereon, as the case may be." pp. 377-8.

In an early case Mr. Justice Daniel, speaking for this court, (20 *How.*, 561) said:

> "The authority and effect of the Territorial laws of Minnesota upon subjects within the legitimate bounds or cognizance of that Territorial Government, no person, it is presumed, will be disposed to question; but it seems equally clear that to respect the rights and interests which come not within the scope of that authority, but which are created by the Constitution and Laws of the United States, imposes a duty as sacred as any which enjoins upon a State or Territory the obligation to protect and maintain whatever of power may justly belong to it. And it cannot without extravagance be supposed, that to secure these proper and necessary ends, the Territory should assume the power to control the acquisition or transmission of property never belonging to, and not acquired from, herself; to which, therefore, she could annex no conditions, much less conditions which might impair the interest of the citizens of every state, and of every state collectively in the Confederacy, and even of the United States, and render utterly worthless, and incapable of being disposed of, subjects of which the territory has no legal right or property whatever. It cannot be denied that all the lands in the Territories, not appropriated by competent

authority before they were acquired, are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such title as the Government may deem most advantageous to the public fisc, or in other respects most politic. This right has been uniformly reserved by solemn compacts upon the admission of new states, and has heretofore been recognized and scrupulously respected by sovereign States within which large portions of the public lands have been comprised, and within which much of those lands is still remaining. Can this right co-exist with a power in a Territory (itself the property of the United States) to interpose and to dictate to the United States to whom, and in what mode, and by what title, the public lands shall be conveyed?" (*Irvine v. Marshall, et al. 20 How., 561.*)

The power of the Territorial legislature to make this grant is utterly inconsistent with the right of the United States to control and dispose of their own property wheresoever the same may be situated, which is established by many decisions.

Gibson v. Chouteau, 13 Wall., 92.
Van Brocklin v. Tennessee, 117 U. S., 151.
Van Sickle v. Haines, 7 Nev., 262.
Thorpe v. Freed, 1 Montana, 680.
Paige v. Peters, 70 Wis., 178.

II.

The act in question is in direct conflict with the legislation of Congress on the same subject.

The courts below found as matter of law:

> That the plaintiff, by the filing of its articles of incorporation with the secretary of the Territory of New Mexico and complying with the provisions of the act under which it is incorporated, has acquired a right to construct its canal and reservoirs to divert through its proposed canal surplus and unappropriated waters flowing in the Rio Grande and that such a right of eminent domain does not depend upon the ownership of lands by plaintiff or the employment of plaintiff prior to the construction of its canal by owners of lands to carry water for such owners. (*Trans., p. 36*).

The proviso to the act of March 3, 1877, commonly known as the desert land act, is as follows:

> "Provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres, shall depend upon *bona fide* prior appropria-

tion, and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights." (*1st Supp. Rev. Stats.*, *137*).

Can it be said that water, to which appellee has acquired the rights set forth in this conclusion of law, yet remains "free for the appropriation and use of the public for irrigating, mining and manufacturing purposes?"

The legislation of Congress which is set out in the statement of the case and need not be repeated here, shows that the established policy of the Government has always been to leave the public water supply open to appropriation by settlers upon the public domain, and by miners and others engaged in the development of the mineral and other resources of the country, and evinces a settled purpose not to permit such water supply to be monopolized or to become the subject of speculation and traffic for pecuniary profit. The first legislation of Congress on this subject, which is compiled in *Sections 2339* and *2340 of the Revised Statutes*, was declared by this court to be rather a recogni-

tion of existing rights than the creation of new rights. (*Jennison v. Kirk*, 98 *U. S.*, 453).

It is true that Congress thus recognized the right of prior appropriation of waters of running streams upon the public domain, but it is also true that with the recognition goes a limitation upon the right, which is of universal application, and that is, that no person may lawfully divert from any such stream more water than is actually applied to a beneficial use. Appellants' contention is not that any number of cultivators of the soil may not unite their efforts and make, by themselves, or by their duly constituted agent, a joint diversion and an individual appropriation, of the waters diverted so as to acquire a perfect right to the use of such waters, but their contention is that the right to the use of water for purposes of irrigation is incident to the ownership or occupation of lands, without which it does not exist.

This principal runs through all of the decisions of this court upon this subject.

> "The right to water by prior appropriation, thus recognized and established as the law of miners of the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made. A different use of the water subsequently does not affect the right; that is subject to the same limitations, whatever the use. The appropriation does not confer such an absolute right to the body of the water diverted that the owner can allow it, after its diversion to run waste and prevent others from using it for mining or other legitimate pur-

poses; nor does it confer such a right that he can insist upon the flow of the water without deterioration in quality, where such deterioration does not defeat nor impair the uses to which the water is applied.

Such was the report of the ruling of the Supreme Court of California in Butte Canal and Ditch Company vs. Vaughn, where it was held that the first appropriator had only right to insist that the water should be subject to his use and enjoyment to the extent of his original appropriation and that its quality should not be impaired so as to defeat the purpose of that appropriation. To this extent, said the court, his rights go and no farther; and that in subordination to them subsequent appropriators may use the channel and waters of the stream, and mingle with its waters other waters, and divert them as often as they choose; that whilst enjoying his original rights the first appropriator had no cause of complaint. In the subsequent case of Ortman vs. Dixon, the same court held to the same purport, that the measure of the right of the first appropriator of the water as to extent follows the nature of the appropriation or the uses for which it is taken." (*Atchison vs. Peterson, 20 Wall., 514.*)

"Ever since that decision (*Tartar vs. Spring Creek Water and Mining Company, 5 Calif., 397*) it has been held generally throughout the Pacific States and Territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection. Water is diverted to propel machinery in flour mills and saw mills and to irrigate land for cultivation, as well as to enable miners to work their mining

> claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual." (*Basey vs. Gallagher, 20 Wall., 683.*)

Other cases cited at the foot of this proposition are in entire harmony with the contention of appellants that this is and has been the settled policy of the Government from the beginning. If, under acts of Territorial legislatures, corporations may be formed to monopolize the water supply of the arid region and the mere filing of articles of incorporation under such acts confers authority to take and divert the unappropriated waters of the public streams, the will of Congress is necessarily thereby defeated. Water, for the use of which, tribute must be paid to a private corporation, cannot be said to be free and subject to appropriation by the public. Appropriation, in the sense of the act of Congress, has a well defined meaning. This is recognized by the opinion of the court below in which it is said:

> "To constitute a valid, prior appropriation of the water of the Rio Grande, two things must be shown. First, there must be a rightful diversion. Second, an appli-

cation to some beneficial use, and neither of these is sufficient without the other."

(*Trans., p. 51*).

However, the opinion proceeds:

"It is not essential that the water shall be used by the person or corporation diverting the water from the stream, for law is well settled that water may be diverted from the streams by canals and ditches owned by individuals or corporations, and conducted long distances and beneficially used by others. This is fully established by the large canal and ditch systems existing in California, Colorado, Arizona and many other states. In such cases the beneficial user is held to have constituted the ditch or canal company his agent, to divert and conduct water for his use, and the Latin maxim, *qui facit per alium, facit per se*, seems to apply in such cases.

I see no reason, therefore, why such reservoir, canal and ditch companies as are authorized by the laws of the Territory should not be allowed to perform services in connection with the irrigation of lands in this Territory similar to those performed by such corporations in other states and territories where the same law, as to water rights, prevails. I can see no legal reason for preventing them from exercising the power conferred upon such companies by the statute, provided there is surplus water subject to appropriation through the agency of such company."

(*Trans., p. 51*).

In view of the facts that the courts below have found that there is no evidence that appellee relies on any source of water supply other

than the Rio Grande or that its canal is expected or intended to receive and distribute stored waters and that the appellee is not the owner of any lands and has no contract with or employment by any person who is the owner of lands irrigable from its proposed canal for the conduct of waters upon such lands and that there is no evidence that any owner of lands not now irrigated from existing acequias desires or intends to irrigate such lands from the proposed canal when completed, it seems a little difficult to understand the application, to the case at bar, of the maxim relied on in this quotation. The attempt to apply the maxim seems to appellants almost, if not entirely, to concede their position.

In the case of *Millheiser v. Long*, (*61 Pac. Rep., 111.*) which was decided by the supreme court of New Mexico on the same day on which the case at bar was decided, the doctrine contended for by appellants was recognized and applied as between natural persons as appears from the syllabus of the case prepared by the court, as follows:

> "1. Capacity of ditch alone does not constitute a valid appropriation of water, unaccompanied by application of the water to some beneficial use.
>
> 2. Where two ditches are receiving water from the same stream, one constructed in 1885, and the second in 1888,—the owners of water rights in the first at the time the second is constructed have a prior appropriation of so much water as has been actually applied by them to some beneficial purpose; but sales of water rights by them, for the use of water to be conducted

through the first ditch in excess of valid appropriation by the owner of water rights in the first ditch, after water has been diverted and beneficially applied through the second ditch, is void as to such excess, as against the rights of valid appropriators through the second ditch.

3. Where the controversy involves the prior appropriation of water between those claiming water rights in two ditches constructed at different times, proof which fails to show what tract or tracts of land water was conducted upon, how much of the land, for what years, and what portion each year, is not sufficiently specific to base a decree upon as to the prior appropriation of the water, where numerous tracts of land and ten years' time, are involved."

It is true that in the case referred to no rights were claimed by either party under the act of 1887, which is called in question in this case. Certain it is, however, that the court held in the Millheiser case, in effect, that, the diversion of water in excess of the amount actually applied to a beneficial use was unlawful *ab initio* and that water so diverted could not be sold so as to vest any right in the purchaser; which seems to be entirely irreconcilable with the holding in the case at bar. It does not meet this criticism to say that in the Millheiser case there was a subsequent valid appropriation through the second ditch and that the contest there was one of priority between appropriators who were in good faith attempting to acquire a right to the use of the water, because, if the proposed diversion by appellee, is held in this case

lawful when accomplished, it must follow logically that the only right to the use of this water which can be acquired by any one must be acquired under appellants.

The decisions of the supreme court of Colorado are much relied on by the courts below and counsel for appellee to support the decision in this case, while appellants and their counsel insist that the decisions of that court are in accord with their contention.

The constitution of the State of Colorado contains this provision:

> "Sec. 5. The water of every natural stream not heretofore appropriated within the State of Colorado is hereby declared to be the property of the public; and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided.
>
> Sec. 6. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall be given the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes.
>
> Sec. 7. All persons and corporations shall have the right of way across public, private and corporate lands, for the construction of ditches, canals, and flumes

for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.

Sec. 8. The general assembly shall provide by law that the board of county commissioners, in their respective counties, shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations." (*Constitution of 1876, Article XVI*).

The legislation enacted to carry into effect these constitutional provisions distinctly authorizes the creation of corporations for the purpose of carrying the public waters to consumers.

"*Sec. 308.* Whenever any three or more persons associate, under the provisions of this act, to form a company for the purpose of constructing a ditch for the purpose of conveying water to any mines, mills or lands, to be used for mining, milling or irrigating of lands, they shall, in their certificate, in addition to the matters required in section two (2) of this act, specify as follows: "The stream or streams from which the water is to be taken; the point or place on said stream at or near which the water is to be taken out; the line of said ditch, as near as may be, and the use to which the said water is intended to be applied." *Rev. Stats. Colo., 1883, Sec. 308.*)

At the time of the compilation of 1883, the State of Colorado was divided into ten irri-

gation districts and in each district there was a water commissioner appointed by the governor whose duty, among other things, was as follows:

> "*Sec. 1754.* It shall be the duty of the said water commissioners to divide the water in the natural stream or streams of their district among the several ditches taking water from the same, according to the prior rights of each respectively; in whole or in part to shut and fasten, or cause to be shut and fastened, by order given to any sworn assistant, sheriff or constable of the county in which the head of such ditch is situated, the head gates of any ditch or ditches heading in any of the natural streams of the district, which, in a time of scarcity of water, shall not be entitled to water by reason of the priority of the rights of others below them on the same stream." (*Rev. Stats. Colo., 1883, Sec. 1754.*)

Elaborate provision is made to enable the water commissioner to enforce the powers conferred upon him by the statute. Priority of appropriation is established by the provisions of *Sec. 1763.*

> "Sec. 1763. In order that all parties may be protected in their lawful rights to the use of water for irrigation, every person, association, or corporation owning or claiming any interest in any ditch, canal or reservoir, within any water district, shall, on or before the first day of June, A. D. 1881, file with the clerk of the district court having jurisdiction of priority of right to the use of water for irrigation in such water district, a statement of claim, under oath, entitled of the

proper court, and in the matter of priorities of water rights in district number——, as the case may be, which statement shall contain the name or names, together with the post-office address of the claimant or claimants claiming ownership, as aforesaid, of any such ditch, the owner or owners shall choose and adopt a name, to be therein stated, by which such ditch, canal or reservoir shall thereafter be known, the description of such ditch, canal or reservoir as to location of headgate, general course of ditch, the name of the natural stream from which such ditch, canal or reservoir draws its supply of water, the length, width, depth and grade thereof, as near as may be, the time, fixing a day, month and year as the date of the appropriation of water by original construction, also by any enlargement or extension, if any such thereof may have been made, and the amount of water claimed by or under such construction, enlargement or extension, and the present capacity of the ditch canal or feeder and *also the number of acres of land lying under and being or proposed to be irrigated by water from such ditch, canal or reservoir.* Said statement shall be signed by the proper party or parties." (*Rev. Stats. Colo., 1883, Sec. 1763.*)

The essential difference between the provisions of the constitution and statutes of Colorado and the legislation of Congress is found in the fact that the constitution and statutes of Colorado sanction the business of transporting water for hire from natural streams to distant consumers, authorize the creation of quasi public corporations for

that purpose, while the legislation of Congress requires that,

> "All surplus waters over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights."

In the light of this distinction appellants submit this quotation from a leading Colorado case:

> "Does the record show a clear legal right of relator, from the enjoyment of which he is unlawfully precluded by respondent? Our constitution dedicates all unappropriated water in the natural streams of the state "to the use of the people," the ownership thereof being vested in the "public." The same instrument guarantees in the strongest terms the right of diversion and appropriation for beneficial uses. With certain qualifications, it recognizes and protects a prior right of user, acquired through priority of appropriation. We shall presently see that, after appropriation, the title to this water, save, perhaps, as to the limited quantity that may be actually flowing in the consumer's ditch or lateral, remains in the general public, while the paramount right to its use, unless forfeited, continues in the appropriator. But, to constitute a legal appropriation, the water must be applied within a reasonable time to some beneficial use; that is to say, the diversion ripens into a valid appropriation only when the water is utilized by the consumer, though the pri-

ority of such appropriation may date, proper diligence having been used, from the commencement of the canal or ditch. The *constitution unquestionably contemplates and sanctions the business of transporting water, for hire,* from natural streams to distant consumers. The Colorado doctrines of ownership and appropriations (as declared in the constitution, statutes and decisions) necessarily give the carrier of water an exceptional status; a status differing in some particulars from that of the ordinary common carrier. Certain peculiar rights are acquired in connection with the water diverted. It is unnecessary, now, however, to enumerate these rights in detail; for the present, *it suffices to say that they are dependent for their birth and continued existence upon the use made by the consumer.*"

Wheeler v. Northern Colo. Irr. Co., 17 Pac., 489-90.

If appellee's contention is sustained, appellants may not enlarge their ditches or increase the area of their cultivated lands, because to do so will require an additional water supply, which cannot be obtained without invading rights established by the decree in this case to be in appellee. Neither can a settler upon the public domain divert the waters of the Rio Grande for the purpose of reclaiming and acquiring title to desert land, under the public land laws, except subject to the rights of appellee, as determined by this decision.

Appellants insist that such a result cannot be supported upon principle or authority.

Starr v. Beck, 133 U. S., 541.

Turner v. Colo., 49 Pac., 971.
Combs v. Agricultural Ditch Co., 28 Pac., 966.
Creek v. Bozeman Water Works Co., 38 Pac., 459.
Senior v. Anderson, 115 Cal., 496.
Smith v. Hawkins, 110 Cal., 122.
Simpson v. Williams, 4 Pac., 1213.
Barrows v. Fox, 98 Cal., 63.
Faulkner v. Rondoni, 104 Cal., 140.
Farmers' Canal Co. v. Southworth, 21 Pac., 1028.
Rominger v. Squires, 12 Pac., 213.
Schilling v. Rominger, 4 Colo., 104.
Becker v. Marble Creek Irr. Co., 49 Pac., 893.
St. Louis Water Co. v. Estrada, 48 Pac., 1076.
Tyler v. Wilkerson, 24 Fed. Cases, page 472, Case No. 14312.
Regnew v. Tacoma Light & Water Co., 38 Pac., 147.

III.

The act in question is in conflict with the treaty of Guadalupe Hidalgo and therefore void.

Appellants by paragraph ten of their answer set up and claim a vested right to divert the entire flow of the waters of the Rio Grande acquired by their ancestors, grantors and predecessors in title prior to the acquisition of the Territory of New Mexice by the United States and allege that these rights are protected and guaranteed by the terms of the treaty commonly known as the treaty of Guadalupe Hidalgo and are not subject to be defeated or impaired by any law of the Territory

of New Mexico. As to this claim the courts below said:

> "That the defendant cannot lawfully set up in this action any rights secured to them and other associates of their predecessors in title by the treaty of Guadalupe Hidalgo and that the allegations of paragraph ten of the answer of defendants with reference to the the treaty rights of defendants are immaterial."
>
> (*Trans., pp. 15-16.*)

This was equivalent to striking out paragraph ten of the answer and entitles appellants to have the allegations of this paragraph of the answer, taken as true, on this review, or, at least, to have the ruling treated as if the courts below had rejected offers, made at the trial, to prove the allegations contained in that paragraph. (*Budzisz vs. Illinois Steel Co., 170 U. S., 43.*)

Unless it can be said that there is no fact properly pleaded in paragraph ten of the answer, it must be conceded that appellants are entitled to the deliberate judgment of the court below, as to the legal effect of such facts, which, as affirmatively appears from the record, they have not had; the courts below having simply refused to give any consideration whatever to those facts. This action of the courts below, as is apparent from the opinion sent up with the transcript, was based upon a misunderstanding of appellants, contention.

Those courts said:

> "Upon the allegation of defendants as to treaty rights, I am of the opinion that the lands of citizens of New Mexico, since

> the cession, are subject to the operation of the law of eminent domain under the laws of the United States and the states and territories thereof, and not exempt therefrom by virtue of the treaty of Gaudalupe Hidalgo. The appropriation and distribution of water must be governed by similar laws, inasmuch as the United States has adopted its own system of water rights and adjusted the system to the different sections of the country as necessity required, and the laws of the states and territories are in harmony therewith. Those laws must govern wherein they differ from the treaty provisions, and wherein they are harmonious, treaty provisions need not be considered. The laws of the United States and the states and territories are ample for the protection of the rights of appropriators of water in this territory, and remedies for impairment or destruction of such rights are adequate also."
>
> (*Trans., p. 60.*)

Appellants do not claim any exemption from the operation of Territorial laws conferring the right of eminent domain, because of anything contained in the treaty of Guadalupe Hidalgo. They claimed and now insist that in case of a conflict between a law of the Territory of New Mexico and a treaty stipulation of the United States made in pursuance of law, the treaty is of paramount authority and must prevail. This court has, in numerous cases, established this doctrine.

> "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the govern-

ments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made, or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." (*Head Money Cases, 112, U. S., 958.*)

In *Hauenstein v. Lynham*, (*100 U. S., 488*), this

court quotes with approval the following extract from the opinion in the case of *Ware v. Hylton*, (*3 Dal., 199*):

> "A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a State legislature can stand in its way. If the Constitution of a State (which is the fundamental law of the State and paramount to its legislature) must give way to a treaty and fall before it, can it be questioned whether the less power, an act of the State legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual State, and their will alone is to decide. If a law of a State contrary to a treaty is not void, but voidable only, by a repeal or nullification by a State legislature, this certain consequence follows,—that the will of a small part of the United States may control or defeat the will of the whole."

In a very late case, where this court had under consideration the very treaty stipulations relied on by appellants, it is said:

> "Undoubtedly, by the rules of international law and in accordance with the provisions of the treaty between the Mexican Government and this country, the United States are bound to respect the rights of private property in the ceded territory." (*Barker v. Harvey, 181 U. S., 486*).

Appellants submit that the allegations of paragraph ten of the answer are well pleaded. It is true that some of those allegations relate to the

existence and effect of Spanish and Mexican laws, and that this court takes judicial notice of those laws. (*United States vs. Chavez, 159 U. S., 452*). It is also true, that it was incumbent upon appellants, under elementary rules of pleading, to plead those laws, in order to bring them to the attention of the court, if they were relied upon, as the basis of any right, involved in the litigation.

The fact that this court takes judicial notice of such laws does not change the rule of pleading but probably subjects the pleading to examination for the purpose of determining whether or not those laws are as alleged, and appellants submit that their allegations as to those laws, are well supported by authority.

In the very recent case of *Whitney vs. United States*, (*181 U. S., 108*), this court said:

> "In reviewing questions arising out of Mexican laws relating to land titles we recognize what an exceedingly difficult matter it is to determine with anything like certainty what laws were in force in Mexico at any particular time prior to the occupation of the country by the American forces in 1846-1848. This difficulty exists because of the frequent political changes which took place in that country from the time the Spanish rule was first thrown off down to the American occupation. Revolutions and counter-revolutions, empires and republics, followed each other with great rapidity and in bewildering confusion, and emperors, presidents, generals and dictators, each for a short period, played the foremost part in a country where revolution seems during that

> time to have been the natural order of things. Among the first acts of each government was generally one repealing and nullifying all those for its predecessors."

While the changes mentioned by the court have been the occasion of much difficulty in determining the validity of grants, it is believed that the law of water rights remains the one stable and unchanging thing throughout the vicissitudes of that government and that at the time of the treaty of cession the laws relating to waters and water rights remained substantially unchanged from the time of the earliest occupation of the country of which we have record.

It is not deemed necessary to discuss at this time in great detail the nature and extent of those water rights because it is believed that the exigencies of this case require no more than a demonstration that they were substantially as set up in paragraph ten of the answer. Perhaps the supreme court of the State of California, more often than any other tribunal, has been confronted with questions of this character and certainly that court displays a wealth of learning in dealing with them.

While we have no reported cases in California at all analogous to the case at bar, the reasoning and comments of the supreme court of that state upon questions of Spanish and Mexican law are believed to be of the greatest value. Therefore we submit the following extensive quotations:

From Lux vs. Haggin, (69 Calif., 255):

> "The common use of the water, it would seem, existed only while they con-

tinued to flow in and constituted a portion of the river. But under the Mexican law an exclusive use of parts or the whole of the waters of a river might be legally acquired by individuals." (*p. 317*).

"Those who appropriated and diverted the waters of an innavigable river in accordance with the laws obstructed *pro tanto* its common use. Nevertheless, they acquired an exclusive right to the use of that which they diverted, because, if they complied with the established conditions, their rights were acquired under and in accordance with law, and the waters they diverted were no longer portions of the waters of a river, or subject to the common use. No one of such had any right in or to the water until he had complied with the conditions which authorized him to appropriate it. Every one of such who complied with the conditions, and appropriated water, acquired a vested right in such water, at least while he continued to use it, except in the single case where he acquired a right merely conditional, under laws which reserved the power in the agents of the state or municipality to deprive him of it without indemnification. It may be conceded that one who had acquired a right to the exclusive use of a portion of the waters of a river under the Mexican regime could not be deprived of his right by a law of California. * *

Those who had not appropriated waters in the mode prescribed had no right or property in the water or its use, of which they would be deprived by subsequent legislation conferring the use of the waters on riparian proprietors alone. And it would seem very clear that those

who actually appropriated water, in compliance with the conditions prescribed, acquired a proprietary interest of which they could not be deprived—at least while they continued its use—except on sufficient indemnification. It cannot be presumed that, under a constitution which declares, in as distinct terms as does our own, that private property shall not be taken, except on due compensation, the legislature attempted to authorize an arbitrary deprivation of property rights acquired by expenditures invited by the laws themselves." (*pp. 322-3*).

"Thus the property of the nation is in the river and its bed, while it is the bed of the river; the common use continues while the water is the water of a river. But a private right to the exclusive use of the waters could be acquired under the Mexican law by prescription, or on compliance with the established conditions; and the general property of the nation in running waters did not prejudice such special private rights." (*p. 324*).

"The laws of Mexico relating to pueblos conferred on the town authorities the power of distributing, to the common lands and to its inhabitants, the waters of an innavigable river on which the pueblo was situated. It is not necessary to say that the property of the nation in the river, as such, was transferred to the pueblo, but it would seem that a species of right to the use of all its waters necessary to supply the domestic wants of the publadores, the irrigable lands and the mills and manufactories within the general limits, was vested in the pueblo authorities, sub-

ject to the trust of distributing them for the benefit of the settlers.

A translation of the plan of Pitic is annexed to Dwinnelle's Colonial History of San Francisco. (Addendum, No. 7). The original is not before us. Whether the plan of Pitic is or is not a scheme in all respects applicable to every pueblo created after the date, November 14, 1789, (as is claimed by counsel), it may be conceded the provisions therein contained were, in susbtance, those having force in the pueblos established in California while it was part of the territory of Mexico. (*p. 326.*)

"The plan authorized a commission, after the measurement of the exterior lines of the four leagues to set apart the *ejidos*, *popris*, etc., and to distribute the remaining lands to the settlers in separate tracts.

The nineteenth and twentieth sections of the plan read:

"Nineteenth—the advantage of irrigation being the principal means of fertilizing the lands, and the most conducive to the increase of the settlement, the commissioner, shall take particular care to distribute the waters so that all the land that may be irrigable might partake of them, especially at the seasons of spring and summer when they are most necessary to the cultivated land in order to insure the crops, for which purpose, availing himself of skillful or intelligent persons, he shall divide the territory into district (partidos) or hereditaments, marking out to each one a trench or ditch, starting from the main source, with the quantity of water which might be regu-

lated as sufficient for its irrigation, at the said periods and at the other seasons of the year that they may need them, by which means each settler shall know the trench or ditch by which his hereditament shall be irrigated; and that he cannot and shall not have the power to take the water of another, nor in a greater quantity than that which may fall to his share, for which purpose and that it may not increase in injury to the owners situated on the land beyond or still lower, it shall be proper for the trenches or partitions to be constructed in the main ditch made of lime and stone at the cost of the settlers themselves.

"Twentieth—In order that these (the settlers) might enjoy with equity and justice the benefit of the waters in proportion to the need of their respective crops, there shall be named annually by the ayuntamiento one alcalde (or mandador) for each trench, to whose charge shall fall the care of distributing them in the estate (heredades) comprised in the 'partido' or hereditament, which shall be irrigated by them in proportion to their need for this benefit, designating by a list which he shall make out the hours and day and night at which each owner (heredado) shall irrigate his lands sown with grain; and in order that by the carelessness or indolence of the owners (duenos), those (the lands) that may need them shall not remain without irrigation, nor the crops be lost, whereby independent of the private injury may also result that of the public and community, produced by the want of provisions and supplies, it shall also come within the duty of the alcalde, or mandador, for each trench to have a servant (peon) or day

laborer, knowing the hour of the day or night designated for the irrigation of each tract of land or cornfield, who, in default of its owner, shall take care to irrigate it; the just price of his labor, which shall be caused to be paid to him by the owner of the land or estate (heredad) irrigated to be thereafter regulated by the commissioner or by the justice." (*pp. 326-7-8*).

The same court in *Vernon Irrigation Co., vs Los Angeles*, (*106 Cal., 247*), said:

"Now the waters of all rivers were, under the Spanish and Mexican rule, public property, to be administered and distributed for the use of the inhabitants. Apparently this was sometimes done by the Pueblo authorities outside of the Pueblo lands. It must be remembered that towns and villages were greatly favored under the Mexican system; that to establish them was the mode adopted for the settlement of the country. Contractors (capitulantes) were rewarded for organizing them. The ordinances of the king of Spain and the provisions of the government of Mexico in regard to them direct that they be located where water will be convenient. The organization of the pueblo of Los Angeles itself—to be hereafter referred to—will show the solicitude of the government in regard to this matter. Since the water belonged to the nation and could not be acquired from it by condemnation, it would seem to follow, as a matter of necessity, that, when the pueblo was organized under the laws, a sufficiency of this water for the pueblo was appropriated to it. The country was arid. The population was at first

almost wholly agricultural, and, we have seen, the waters were held by the pueblo, subject to the duty of distributing the same in the public interest.

"Nor do I think this was a mere political power which could be revoked at any time, so as to deprive the settlers, who had been induced to become inhabitants of the pueblo, of it. They had the same kind of right with reference to it which they had to the lands. Both were held as communal property, for the benefit of the inhabitants, and as an inducement to attract settlers.

"This view was adopted by this court in *Lux. V. Haggin, 69 Cal., 255.* The question there was whether, under Mexican or Spanish law, the water of rivers was dedicated to the public in such sense that the people could not be deprived of the common use. It was said that pueblos acquired a species of property in the water of streams within their boundaries—a right which was inconsistent with such supposed dedication. They had title to such waters, subject to the public trust of continuously distributing the same in just proportion. After citing authorities in support of the position the court proceeds: 'From the foregoing it appears that the riparian proprietor could not appropriate water in such manner as would interfere with the common use or destiny which a pueblo on a stream should have given to the waters, and semble that the pueplos had a preference or prior right to some of the waters, even as against the upper riparian proprietor.' The common use, here spoken of, is the use for the benefit of the com-

munity or the inhabitants of the pueblo.

"This view, I think, finds support in the history of the pueblo of Los Angeles. In 1779 it was determined to found a pueblo called Reyna de Los Angeles, settling it with soldiers and families told off from the garrisons; and the location was selected with a view to land and water for cultivation. In 1781 Don Phillipe de Neve, Governor, issued a decree providing for the founding of the pueblo in the immediate vicinity of the river Porconcula; all the land capable of irrigation should be carefully examined, and a point selected for the erection of a dam, which would insure the distribution of the water to greater portion of the lands, and the site of the town should be as near the river as possible.

"When we remember that these pioneers were really farmers or stockraisers, and the irrigation was a necessity, this order with the instructions is very significant.

"There is also an order made by Don Pedro Fages, governor of the peninsula of California, August 14, 1786, for the distribution of lands to the settlers at Los Angeles. It commissions the Ensign Don Jose Arguello to proceed to Los Angeles and give formal possession, directing him to clearly define what are public domains, viz., water, pasture, wood, etc.

"Arguello reported his compliance September 5, 1786, showing that he had confirmed to each settler his lot, and had measured the lands still unassigned and reserved to the crown, assigning them for the common use of the settlers for pastures,

for keeping stock, with a common right in all the waters, wood and timber.

"It also appears that in 1810 complaints were made to the commandante that the priests of San Fernando had diverted the water on the Cahuenga ranch, to the injury of the pueblo. The controversy was settled, the priests acknowledged the superior right of the pueblo.

"Counsel have furnished me with translations of numerous ordinances, laws, rules and regulations of Spain and Mexico relating to this subject. After perusing them I am satisfied with the conclusion reached in *Lux v. Haggin*, *supra*, that pueblos had a right to the water which had been appropriated to the use of the inhabitants, similar to that which it had in the pueblo lands, and that the right of its successor, the city, to the water, for its inhabitants and for municipal purposes, is superior to the rights of plaintiff as a riparian owner.

"The question recurs, has the city a right to take from the river more water than it requires for those purposes that it may sell such water to those outside the city limits? I think, this question must be answered in the negative. It was so determined in *Felix v. City of Los Angeles*, *58 Cal.*, *73*, although it was also said in that case that the city had a right to all the waters of the river if it required for municipal purposes or for the use of the inhabitants.

"I quote: 'It was conceded on the argument that the city had appropriated a portion of the waters of the Los Angeles river before the plaintiff constructed its ditches, and that the use by the city to the extent of such appropriation could not be

interfered with by any subsequent appropriation; but it was contended that the rights of the city were limited to the amount aporopriated at the time plaintiffs or their grantors built their ditch. Such a construction of the defendants' rights would not be in harmony with the facts found by the court. From the very foundation of the pueblo, in 1781, the right to all the waters of the river was claimed by the pueblo, and that right was recognized by all the owners of land on the stream, from its source, and under a recognition and acknowledgment of such right plaintiff's grantors dug their ditch. * * * * The city, under various acts of the legislature, has succeeded to all the rights of the former pueblo. * * * * From the fifth finding it appears that when the acts complained of were done by the officers and agents of the defendants, all of the waters of the Los Angeles river were required and were not sufficient to supply the wants of the city, and we are of the opinion that it was the right of the municipal authorities to prevent any diversion of said waters at the time by the plaintiffs.'

"'We do not intend to be understood as holding, nor do we hold, that the city, has the right at any time to dispose of the waters for use upon land situated without the city limits. On the contrary, we are of the opinion that the city has not that right.'"

Hall's Mexican Law, 411.
Escriche, Vol. 1, *p.* 79, "*Acequia.*"
Same, p. 134, *S. IV*, "*Agua.*"

IV.

The act in question is void because it is not a reasonable exercise of legislative power.

This court takes judicial notice of the fact that New Mexico is in the arid region where agriculture is impossible except my means of irrigation; also that in portions of the Territory a system of irrigation has been in existence for centuries and that by this system entire communities owning agricultural lands, have been accustomed to join together for the purpose of excavating ditches, called *acequias*, to facilitate the irrigation of their lands, and that the practice of making in this manner joint diversion and individual appropriations of water for purposes of irrigation, prevails in all of the thickly populated portions of the Territory and especially including the valley of the Rio Grande. The court also takes judicial notice of the fact that in the unsettled and undeveloped portions of the Territory, particularly in the mountainous regions, water may be impounded by means of dams and reservoirs and lands, otherwise valueless, may be thereby reclaimed and made enormously productive. It is a matter of common knowledge that the acreage of lands of the latter class are counted by millions, that they are practically all, yet a part of the public domain and that the field for reclamation of lands of this character in the territory is inexhaustible, while the public

lands in some parts of the Territory are comparatively of very limited extent.

From these conditions, considered in connection with the topography of the country and the necessities of the people in the more densely populated portions, it is quite obviouse that a statute such as the one in question, although well calculated to meet the conditions existing in the unsettled and undeveloped portions of the Territory, must operate most unjustly and oppressively, in the settled and developed portions.

Notwithstanding these widely differing conditions, the legislature has attempted to authorize any five or more persons, who may file in the office of the Secretary of the Territory, articles of incorporation, as required by the act, to go into any part of the Territory, settled or unsettled, and to construct canals without regard to the existing local conditions and whether or not the particular section invaded is already sufficiently supplied with canals and irrigating facilities. There is no restriction as to locality; no limitation as to the size of canals; no requirement that the persons forming corporations under the act shall be owners or cultivators of land or identified with such owners or cultivators by any contractural or other relation or that any public necessity for the construction of the canal shall be shown to exist, nor even that there shall be a showing or finding by any tribunal or public body or tribunal representing the people, that the canal, when constructed, can be or will be utilized for the irrigation of lands. Neither is

there any limitation as to the number of canals that may be constructed in the same locality, nor any provision for the protection of the people against the oppressive and unnecessary exercise of the power of eminent domain attempted to be conferred. The only limitation on prices to be charged for water is that the rates shall be prescribed by laws of the Company and shall be uniform to each class of consumers. The extent to which lands may be condemned, under the power attempted to be conferred, is not limited by the express terms of the statute, and if the decision of the courts below is sound, such corporations are as unlimited as to the quantity of land to be condemned as they are with reference to the size of the canals to be constructed. The right of condemnation is found in subdivision six of Section 17, as follows:

> "6. To enter upon and condemn and appropriate any lands, timber, stone, gravel, or other material that may be necessary for the uses and purposes of said companies."

One purpose for which such companies are authorized to be formed being the "colonization and the improvements of lands," this language would at least give color to the contention, that the legislature has attempted to authorize the condemnation of lands for "purposes of colonization and improvement," but so far no attempt has been made by appellee to condemn the lands of the appellants and their associates, who continue to irrigate and cultivate them "in accordance with

methods that were in vogue a hundred years ago," in order to colonize them with a more progressive class of farmers: and appellants are not apprehensive of any such attempt, at least in the immediate future.

Since conditions in Colorado are so much relied on by counsel and by the courts below to support the judgment in this case, it is deemed not inappropriate to ask at the hands of the court a comparison of the act in question with the legislation of Colorado, under which the splendid agricultural development of that commonwealth has been accomplished. A single provision of the statutes of Colorado will sharply emphasize the point appellants are now attempting to make.

Sec. 1716 of the *General Statutes of Colorado of 1883*, (the only compilation of the laws of the state within the reach of the writer,) provides:

> "1716. That no tract or parcel of improved or occupied land in this State shall, without the written consent of the owner thereof, be subjected to the burden of two or more irrigating ditches constructed for the purpose of conveying water through said property, to lands adjoining or beyond the same, when the same object can feasibly be attained by uniting and conveying all the water necessary to be conveyed through such property in one ditch."

Under the statute of which appellants complain there is no limit to the number of canals which may be constructed so long as the construction of canals offer the promise of profitable investment for capital. The limitations which the legislature

of Colorado has placed upon the rights granted to corporations formed for the construction of irrigation canals are in striking contrast to those prescribed by this act, especially the method of fixing the rates to be charged to consumers of water, the method of ascertaining and having judicially determined all questions of priority of appropriation and the method of supervision by public officials, of the business of the canal companies, as well as what such a company is required to allege and prove in order to obtain the judgment of a court establishing the amount and date of its appropriation of water. If these regulations were reasonable and necessary to protect the consumers of water, against the abuse of privileges conferred upon such corporations in Colorado, is it not an unreasonable exercise of legislative power to leave the people of New Mexico at the mercy of this class of corporations as to these matters. Is it not so unreasonable and improvident that the courts may, with propriety, say that such legislation is not a rightful subject of legislation and is therefore void? Appellants are aware that the existence of such power as is here contended for is vigorously denied by the supreme court of New Mexico, but submit that the doctrine is not only logically sound in principle but has received the distinct sanction of this court. The case at bar furnishes an apt illustration of the practical results which are to follow if this legislation is sustained. On the one side we have a corporation composed, according to the articles filed with the secretary of the terri-

tory, of seven individuals. In their corporate capacity they own no lands neither have they any contracts with the owners or cultivators of any lands to carry water for them, neither do they show that there are any lands which can be irrigated from their proposed canal when constructed, but for reasons of philanthropy, or of prospective profit, they have determined to construct a canal thirty-five miles long, with a carrying capacity of 210 cubic feet of water per second, notwithstanding the opposition of thousands of people who own and cultivate the soil of the valley of the Rio Grande. I say "notwithstanding the opposition of thousands" advisedly for the answer alleges that the appellants and those associated with them in resisting the construction of this canal number many thousands of people, and, while the courts below denied to appellants the right to represent all of their associates in the litigation, it is nowhere denied that the number of people actively opposing the construction of this canal was numerically as great as alleged in the answer. Appellants submit that the courts are not without power to protect the people against this class of legislative improvidence and that the doctrine first distinctly applied to territorial legislation by the supreme court of Utah, is a salutary doctrine and is not an assumption of legislative functions by the judicial department nor an encroachment by the courts upon legitimate legislative powers.

In People vs. Daniels, *6 Utah, 288, 292, 296*, the Supreme Court had under consideration certain

taxes imposed upon Daniels by a municipal corporation named Moroni City, the seventh section of whose character was identical with that of Kaysville, and the question in respect to the legality of the taxation the same as in the case at bar. The Supreme Court of Utah held that the taxation in question could not be sustained, and, among other things, said:

> "In the organic act Congress, under restrictions, express or implied, confers upon the territorial legislature, authority to legislate with respect to such subjects as concern the people of the Territory. When the authority with respect to the subject is specific, and its extent is clearly defined, the discretion of the legislature within constitutional limitations cannot be questioned; the denial of such discretion would be a denial of the power of Congress; but when the power is given in general terms, and the extent to which it may be exercised upon the subject is not expressly limited and clearly defined in the organic act, then the territorial legislature must exercise its discretion. So far as that discretion is expressly limited by the Constitution or the organic act such limitation must be observed; but when it is not, the legislature must follow the dictates of reason and justice. The law must be reasonable and just, because the court will not presume that Congress intended to authorize the legislature to make an unjust, an unreasonable, an unequal or an oppressive law. The subjects to which the power of the territorial legislature extends are not specifically described, and their number is limited by the word 'rightful'. A law upon a subject act of that number

would be held void. In the case the court would determine that the subject within the power of the legislature; and to the extent to which the legislature may act on a rightful subject, when the limit is not expressly fixed, the court must ascertain the limit and determine whether the law is within it. * * * Municipal charters, boundaries of cities and villages, and municipal taxation, are rightful subjects of legislation, but the extent of the legislative discretion with respect to those subjects is not expressly limited; there must be a reasonable limit, however, to that discretion." The court applied to the provisions of the organic act in question, conferring power on the legislature, the rule of construction applicable to similar provisions in municipal charters, as laid down in *Dillon on Municipal Corporations*, (*4th ed. Sec., 328,*) namely, that what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it to be unreasonable or against sound policy, but where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then an ordinance passed in pursuance thereof must be a reasonable exercise of the power or it will be pronounced invalid. (*Linford vs. Ellison, 155 U. S., 507.*)

People vs. Daniels, 6 Utah, 288.

Linford vs. Ellision, 7 Utah, 166.

Baca vs. Perez, 8 N. M., 187.

V.

Appellee is not authorized to exercise the power of eminent domain.

It is undoubtedly true that the legislature of the Territory of New Mexico has authorized the use of this power, by corporations formed for the purpose of constructing irrigating canals and has thus closed the door to inquiry by the courts as to whether or not irrigating canals constitute such public use as authorizes the taking of private property therefor, without the owner's consent, upon the payment of just compensation. When, however, this particular company comes into a court of justice, asking the aid of the court to restrain the appellants and their associates from interfering with it in the exercise of this power and the appellants and their associates challenge the right to do the acts, the doing of which they have resisted, the existence of the right, becomes at once the subject of judicial inquiry. The use to which appellee proposes to put the land, sought to be surveyed, and eventually taken, and whether such use is in fact public becomes a judicial question; no declaration of the objects and purposes of the company in its articles of incorporation can give it public character, so as to entitle it to exercise the high prerogative of sovereignty, invoked in aid of its enterprise, unless it is in fact public.

The right of the appellee to exercise the power of eminent domain depends upon its

ability to show affirmatively that it is organized to serve the public and not merely for private gain. That such a company derives profit from its service to the public constitutes no argument against its right to exercise the power, if the ability and intent to serve the public are shown, but in this case neither the ability nor the intent has been shown. On the contrary from the facts found it is entirely clear that this is a purely speculative enterprise which seeks by taking advantage of natural conditions arising out of the topography of the country and the peculiar conditions surrounding the cultivation of the lands by means of irrigation, to compel the owners of the soil to abandon means of irrigation entirely satisfactory to them and to adopt others alleged to be more progressive.

> "The right of the state to authorize the condemnation of private property for the construction of railroads and to delegate the power to take proceedings for that purpose to railroad corporations, has become an accepted doctrine of constitutional law and is not open to debate. But the power is dormant until the legislature authorizes its exercise, and the particular corporations which claims the right to exercise the power must be able to show a legislative warrant, and that be shown, it must be able, further to establish, if the right is challenged, that the particular scheme in which it is engaged is a railroad enterprise within the true meaning of the decisions which justify the taking of private property for railroad purposes, or that the business which it is organized

to carry on, is public, and that the taking of private property for the purposes of the corporation is a taking for public use. The general principle is now well settled that when the uses are in fact public, the necessity or expediency of taking private property for such uses by the exercise of the power of eminent domain, the instrumentalities to be used and the extent to which such right shall be delegated are questions appertaining to the political and legislative branches of the government, while on the other hand the question whether the uses are in fact public, so as to justify the taking *in invitum* of private property therefor is a judicial question to be determined by the courts. * * * ."

"If the question, whether the purposes and objects for which the petitioner, The Niagara Falls and Whirlpool Railway Company is organized, are public, so as to justify the exercise in its behalf of the right of eminent domain, is controlled and is to be tested exclusively by the description of those objects and purposes as they are set forth in its articles of association, there could be no hesitation in concluding that the company is entitled to take the proceedings now in question, unless, as is claimed, the particular property now sought to be taken is, on special grounds, exempt from condemnation. Looking at the articles of incorporation alone it appears that the company is a railroad corporation organized under the General Railroad Act for 'public use in transporting persons and property' by a railroad to be constucted between certain termini. The papers on their face show that the corpo-

ration has undertaken an ordinary railroad enterprise within the purview of the act of 1850, in aid of which the power of eminent domain may be appropriately exercised. But when we look beyond the formal documents, and the actual business proposed to be conducted is considered, we find that the proposed railroad has no proper termini; that it is not a highway in any just or proper sense; that it cannot, by reason of necessary limitations, perform one part of the duty it has undertaken, viz., the transportation of freight; that at most it can be operated but a portion of the year, and that the sole object of its construction is to enable the corporation, for a compensation to be received, to provide, for the portion of the public who may visit Niagara Falls, better opportunities for seeing the natural attractions of the locality. We feel constrained to say that in our judgment this is not a public purpose which justifies the exercise of the high prerogative of sovereignty invoked in aid of this enterprise. The right of the company being challenged on this ground, the court is compelled to consider it, and it is manifest that the inquiry is not precluded because the petitioner has organized itself under the General Railroad Act and has assumed in its articles of association the character of an ordinary railroad corporation. What is a public use is incapable of exact definition. The expressions 'public interest' and 'public use' are not synonymous. The establishment of furnaces, mills and manufactories, the building of churches and hotels, and other similar enterprises, are more or less matters of public concern, and promote, in a general sense, the public welfare. But they lie

without the domain of public uses for which private ownership may be displaced by compulsory proceedings. The ground upon which private property may be taken for railroad uses, without the consent of the owner, is primarily that railroads are highways furnishing means of communication between different points, promoting traffic and commerce, facilitating exchanges, in a word they are improved ways. In every form of government the duty of providing public ways is acknowledged to be a public duty. In this State the duty of laying out and maintaining highways has in the main been performed directly by the State or by local authorities, but from an early day the legislature has from time to time delegated to turnpike corporations the right and duty to maintain public roads in localities, and canal companies have been organized with powers of eminent domain. It would be impossible and contrary to our usages for the state to enter upon the general business of constructing and operating railroads, and in analogy to the delegation of the power of eminent domain to turnpike and canal companies, it wisely delegates to corporate bodies the right to construct and maintain railroads as public ways for the transportation of freight and passengers and as incident thereto the right to take private property under the power of eminent domain on making compensation. In considering the question what is a public use for which private property may be taken *in invitum* Judge Cooley (*Const. Lim.*, 669) remarks, 'that can only be considered such, when the government is supplying its own needs or furnishing facilities for its citizens, in regard to these

matters of public necessity which on account of their peculiar character, and the difficulty, perhaps impossibility, of making provision for them otherwise, it is alike proper, useful and needful, for the public to provide.' Whatever rule, founded on the adjudged cases, may be formulated on this subject, it can not, we think, be framed so as to include the present case. The fact that the road of the petitioner may enable the portion of the public who visit Niagara Falls, more easily or more fully to gratify their curiosity, or that the road will be public in the sense that all who desire will be entitled to be carried upon it, is not sufficient, we think, in view of the other necessary limitations, to make the enterprise a public one so as to justify condemnation proceedings."

Matter of Niagara Falls & Whirlpool Railway Co., 109 N. Y., 384.

On the 29th of January, 1899, the Union River Logging Railroad Company procured the then Secretary of the Interior, Mr. Vilas, to approve its map of definite location for a line of railway across the public domain in the then Territory of Washington, and proceeded to construct a railroad, appropriating the public domain for right of way under the provisions of Section 4 of the act of March 3, 1875, granting to railroads right of way across the public domain. On the 29th day of March, 1889, the incoming Secretary of the Interior, Gen. Noble, asked the opinion of the Attorney-General as to his power ot annul and cancel this approval. On the 4th of May, 1890, the Attorney-

General advised the Secretary of the Interior that he possessed the power to cancel the approval of his predecessor, and a rule was issued upon the Union River Logging Railroad Company requiring it to show cause before Secretary Noble why the said approval made by the former Secretary, Mr. Vilas, should not be revoked and annulled. The railroad company appeared and filed an answer, and, after full hearing, Secretary Noble annulled the action of his predecessor, and in his opinion said:

> "I do not think this company is of the character contemplated by the act of March 3, 1875 (18 Stats., 482) granting to railroads the right of way through the public lands.
>
> While the act does not specifically define the character of the railroads which shall be entitled to the benefits of its provisions, yet it seems clear that Congress only meant to extend the benefits of the act to such railroads as are *quasi* public corporations and are common carriers of passengers and freight, having time cards, passengers and freight tariffs, station buildings, depots, machine shops, sidetracks, turnouts and water stations for their use and operation, and for the use of the public, and such cars as are necessary for the safe and proper transportation of freight of different kinds, and the carrying of passengers over the line of such railroad. It is a railway which is of some benefit to the public that Congress desired to favor.
>
> This company is not equipped with the instrumentalities evidencing such a

corporation. It is purely a private enterprise, constructed solely for the transportation of supplies necessary to feed these mills, and make them and the traffic in logs and lumber a profitable venture.

In this proceeding the respondent company was called upon to show cause why the approval of its map of definite location should not be annulled. Under said rule it was bound to show that it was in fact such a railroad as the act of Congress extends the right of way over the public lands to, and that it was rightfully entitled to the benefits conferred by said act. It was not called on to show simply that it was organized as a railroad on paper, but a railroad in fact. Its answer is indefinite and uncertain in its statements of fact; the evidence in support of its answer fails to show that said company has any depot or freight houses or has cars suitable for carrying general freight or passengers; fails to show that said road has any schedule of rates for carrying passengers or freight; fails to show that it runs its trains upon regular trips or at stated times, for the accommodation of the general public; fails to show that it starts from or terminates at any town or city. On the contrary, it appears that said road has been in operation for several years through a scope of country heavily timbered and sparsely settled; that its business has been and consists almost altogether in transporting logs and lumber to tide water on Hood's canal. That it has been operated not as a public railroad, but as a private concern; not in the interest of the public, as a common carrier, but in the private interest of its owners and promoters.

From a careful examination of the

whole record I find: First—That at the time the respondent company filed its articles of incorporation with the register of the local land office, and at the time its map of definite location, or profile, was approved by the Secretary of the Interior, said company was not in fact such a railroad company as would be entitled to the benefits of the act of March 3, 1875, (18 Stats., 482):

Second—That the approval of the map of definite location, or profile of the respondent company's line of road made by the Secretary of the Interior, on January 29, 1889, was procured by fraud and false representations.

From the examination given the authorities, as well as upon principles of a sound public policy, and a just and proper administration the public land-laws, I reach the conclusion that in a case like the one at bar, the secretary of the Interior has the power and authority to recall, annul, and set aside the action of his predecessor in office, in approving the map of definite location or profile of a railroad company, filed under the 4th section of the act of March 3, 1875. Having the power, the case at bar calls for its exercise as a bounden duty.

It is accordingly ordered that the approval of the Secretary of the Interior, dated on the 29th day of January, 1889, of the map of definite location, or profile of the Union River Logging Railroad Company, be and the same is hereby annulled, canceled, set aside, and held for naught, and you are directed to carry out this order by causing it to be entered upon the appropriate plats and records of your

office and the proper local land office."

Union River Logging Railroad Company, 12 Land Decisions, 581.

The right of Secretary Noble to annul the approval, by his predecessor, of the map of definite location, to which the foregoing decision refers afterwards, came before this court on appeal from the decree of the supreme court of the District of Columbia, enjoining the Secretary of the Interior from executing his order revoking the approval of the map.

This court affirmed the decision of the supreme court of the District of Columbia and perpetually enjoined Gen. Noble from executing his order upon the ground that the decision of his predecessor, that the Union River Logging Railroad Company was such a corporation as was entitled to the benefits of the act of March 3, 1875, was judicial in its nature and was not subject to be annulled or set aside by a successor in office of the Secretary who made the original dicision.

Mr. Justice Brown, speaking for the Court said:

> "At the time the documents required by the act of 1875 were laid before Mr. Vilas, then Secretary of the Interior, it became his duty to examine them, and to determine, amongst other things, whether the railroad authorized by the articles of incorporation was such a one as was contemplated by the act of Congress. Upon being satisfied of this fact, and that all the other requirements of the act had been observed, he was authorized to approve

the profile of the road, and to cause such approval to be noted upon the plats in the land office for the district where such land was located. When this was done the granting section of the act became operative, and vested in the railroad company a right of way through the public lands to the extent of one hundred feet on each side of the central line of the road. *Frasher vs. O'Connor, 115 U. S., 10.*"

"The position of the defendants in this connection is, that the existence of a railroad, with the duties and liabilities of a common carrier of freight and passengers, was a jurisdictional fact, without which the Secretary had no power to act, and that in this case he was imposed upon by the fradulent representations of the plaintiff, and that it was competent for his successor to revoke the approval thus obtained; in other words, that the proceedings were a nullity, and that his want of jurisdiction to approve the map may be set up as a defense to this suit. * * * *

"There is, however, another class of facts which are termed *quasi* jurisdictional which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. With respect to these facts, the findings of the court is as conclusively presumed to be correct as its findings with respect to any other matter in issue between the parties. Examples of these are the allegations and proof of the requisite diversity of citizenship or the amount in controversy in a Federal court, which,

when found by such court, cannot be questioned collaterally." * * *

> "In this class of cases, if the allegation be properly made, and the jurisdiction be found by the court, such finding is conclusive and binding in every collateral proceeding. And even if the court be imposed upon, by false testimony, its findings can only be impeached in a proceeding instituted directly for that purpose."

Noble v. Union River Logging R. R. Co.,
147 U. S., 172.

It is obvious that a right to carry water lies at the foundation of the right to construct the canal, that the utility of the canal as a public agency depends upon the existence of this right; that the right to construct the canal cannot exist independently of the right to divert and carry into and through it. There is no such similarity between such a canal and a line of railway as makes the right to construct the one in any sense the true measure of the right to construct the other.

A railway without freight or passengers to be carried would simply be a monument to the folly of its constructors, powerless for evil in the community. Not so with the proposed canal of the appellee. It would be for all ordinary purposes as impassable as the grand canon of the Colorado, except where spanned by substantial and expensive bridges. Without water it would be a public nuisance. With water it would be as it is intended to be, essentially a monopoly, not a competitor as one railroad is with another which it parallels, but,

by reason of its superior size and its crossing and re-crossing the smaller community ditches, it would render their use impracticable.

We have no finding of the dimensions of the canal of appellee except that it has a carrying capacity of 210 cubic feet of water per second and is to be thirty-five miles long. We have a finding that the thirteen community ditches now existing have an aggregate carrying capacity of 498 cubic feet of water per second and we have a further finding that the canal of the appellee will cross and re-cross one of these community ditches, to-wit, the Bernalillo ditch, nine times within a distance of one mile of its length. The findings do not show how many times it will cross and re-cross other existing community ditches nor how many times it will cross and re-cross the Bernalillo ditch in other places, nor are such findings necessary.

It seems entirely legitimate to suggest that the canals of the appellee cannot be less than seven or eight times the size of the Bernalillo ditch and it seems also fair to argue that there is a reason found in the topography of the country for this crossing and re-crossing of the Bernalillo ditch by the plaintiff's canal, which speaks volumes in support of appellants' contention that the appellee's canal is intended to monopolize the water supply and to render impossible the use of existing community ditches.

May appellee destroy means of supplying water to these lands which have existed for cen-

turies, without showing that the people who at present make use of those means and who are the only people, who can use its canal, as a substitute, desire, or are willing to use its canal when constructed?

May it, indeed, exercise the power of eminent domain and take private property for the purpose of constructing its canal without any further showing than is made in this case?

The conclusion of the courts below that appellee, by the mere filing of its articles of incorporation, became authorized to exercise the power of eminent domain, is in direct conflict with principles established by a very large number of decisions.

Weidenfeld v. Sugar Run R. Co., 48 Fed., 615.
Lumbering Co. v. Johnson, 46 Pac., 790.
In re Deansville Cem Assn., 66 N. Y., 569.
In re Eureka Basin W. & M. Co., 96 N. Y., 42.
In re Rochester H. & L. Co., 110 N. Y., 119.
In re N. Y. L. & W. Ry. Co., 99 N. Y., 12.
In re Split Rock Cable Road, 28 N. E. Rep., 506.
Apex Trans Co. v. Garbode, 52 Pac. Rep., 573.
Con. Channel Co. v. C. P. R. R. Co., 51 Cal., 269.
Coster v. Tidewater Co., 18 N. J. Eq., 54.
People ex. rel. Robinson v. R. R. Co., 53 Cal., 694.
Bridalveil v. Johnson, 46 Pac., 790.

VI.

Appellants have an absolute right to represent their associates in this litigation.

The courts below recognized the right of apellants to represent those of their associates claiming a right to the use of the waters of the Rio Grande by prior appropriation, when the appropriation was effected at any point along the line of the proposed canal of appellee, but refused to consider the rights of those persons associated with appellants, who effected their appropriation of water below the mouth of the proposed canal. The conclusion of law attacked is as follows:

> "That the defendants do not and cannot in this action lawfully represent the rights of such persons claiming a right to the use of the waters of the Rio Grande, by prior appropriation, when the appropriation of such persons was effected at a point below the mouth of the proposed canal of plaintiff."
>
> (*Trans., p. 36*).

Looking to the opinion sent up with the transcript, we find the theory upon which this conclusion is reached, to be as follows:

> "I must decline to consider the rights of other than the defendants and those interested along the line of the proposed canal. The Court cannot consider the rights of all the appropriators of water from the Rio Grande, below the terminus of the proposed canal; 1st—because they are not parties to the suit, and therefore not subject to the orders, nor bound by the

decision of this court; 2d the testimony of Mr. Harroun as to the flow of water shows that fully as much water flows in the river at San Marcial, far below Albuquerque, as flows at Albuquerque and above during most of the year and sometimes much more, all of which tends to show that there are tributaries contributing waters to the lower part of the river that must be taken into account when the appropriators below the proposed canal are determined. If the rights of the appropriators below are affected by the diversion of water through the proposed canal, the Courts are open for the protection of their rights. This case involves the right of eminent domain over the defendants' land, or of land owners along the line of the canal, and as to that issue parties below the terminus of the ditch have no interest. The rights of parties to the use of water below the canal cannot be affected by this decision and will not be considered."

(*Trans., pp. 59-60.*)

Appellants do not understand it to be contended that the court takes judicial notice as to the physical results which are to follow from the construction of the canal in question. They know that it is seriously contended that the construction of this canal will not decrease the supply of water available for existing ditches, but they are not aware that this contention has been judicially established or that the courts below are willing to give their assent to it. It cannot be doubted that those appropriators of water whose rights were refused consideration in this case are, as riparian proprie-

tors, entitled to have the volume of the stream flow without diminution in its natural channel until and unless there has been some lawful diversion of the water above them on the stream. Can it be said that they would have no right to appeal to the courts, if the avowed purpose of appellee were, to divert the entire flow of the Rio Grande at the point where it is proposed to place the headgate of its canal, that they would be compelled to wait until such time as the diversion was actually accomplished before they could be heard? If they might resist the diversion of the entire flow, in the case supposed, may they not resist the attempt to divert the large quantity of water sought to be diverted by appellee? Can the corut say to them without a hearing "You will not be permitted to question the rights of this corporation to exercise the power of eminent domain; you are restrained from doing acts which are lawful if your contention is sound, but you cannot be heard in this case as to whether or not they are sound. You must wait until you have received actual and irreparable injury before you can have a hearing as to your rights.

Although the riparian rights of this class of the associates of appellants are clearly sufficient to give them a standing and to entitle them to be heard in this case, it is preferred to place their right upon the broad ground that the restraining order, as issued, was broad enough to subject them to punishment as for contempt, if they disregard it, and therefore entitled them to be heard

in the court issuing it when they challenge in a lawful and legitimate way the right of the court to issue the restraining order.

They sought relief against other unknown persons, and a restraining order, restraining them by name and their agents, confederates and assistants from doing the things complained of, was issued. They answering disclose the fact that their confederates, whom they designate as their associates, number many thousands of persons. In other words, that they were so numerous as to render it impracticable that they should all be brought before the court, and they assumed to defend for themselves and their said associates.

That the court will allow a portion of a great number of persons representing a common interest to sue or defend on behalf of themselves and their associates, is well established.

Smith vs. Swormstead, 16 How., 302.

United States vs. Old Settlers, 148 U. S., 480.

Courts punish persons not parties to the record for violation of their injunctions.

In re Lennon, 166 U. S., 554.

American Steel & Wire Co. vs. Wire Drawers Union, 90 Fed., 616.

It is contrary to the spirit of our institutions to permit any man to be condemned unheard. These associates of appellants, whose rights were refused consideration by the courts below, are today and so long as the judgment in this case remains unreversed, will continue, subject to be punished for contempt if they violate the injunc-

tion which they claim the trial court had no right to issue and as to which both the trial court and the supreme court have refused them a hearing.

> "In our judgment the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice.
>
> Whether the legal status of the plaintiff in error was, or was not, that of an alien enemy, is a point not necessary to be considered; because, apart from the views we have expressed, conceding the fact to be so, the consequences assumed would by no means follow. Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all means and appliances of defense."

McVeigh v. United States, 11 Wall 267.

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural

justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized and you shall not be heard."

Windsor v. McVeigh, 93 U. S., 277.

The representative character of appellants, their common interest with all whom they claimed to represent, brings them within established rules of pleading in such cases as this.

Story Eq., Pl., Ss. 97-98.
Mitford v. Tyler, Eq., Pl., pp. 22-23-261.
Beach Mod., Eq. Prac., S. 63.
Gamble vs. San Diego, 79 Fed. R., 500.

VII.

There is nothing in the legislation of Congress which, even impliedly, recognizes the validity of the act in question.

The last paragraph of Section 18 of the Act of March 3, 1891, is as follows:

> "And the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories."
>
> (*1st Supp. Rev. Stats., p. 946*).

From this language the conclusion is sought to be deduced that Congress thereby relinquished to the territorial legislature the entire control of water for irrigation and other purposes and the contention is made that this amounts to a repeal by implication of the proviso of the Desert Land Act, declaring that these waters shall remain and be held free for the appropriation and use of the public for irrigation, etc., upon which appellants rely.

The very context of the act of March 3, 1891, conclusively shows however, that it was not the purpose of Congress to authorize, or to recognize the power of territorial legislatures, to authorize, the creation of corporations with the powers sought to be conferred by the act in question. By section four of that act it is, among other things, provided:

> "Persons entering or proposing to

enter separate sections, or fractional parts of sections, of desert lands, may associate together in the construction of canals and ditches for irrigation and reclaiming all of said tracts, and may file a joint map or maps, showing their plan of internal improvements."

This court has had occasion to consider the effect of so much of this act as grants the right of way across the public domain for canals and in the case of *Garland v. Bear Lake Irrigation Co., 164 U S., 18-19*, it said:

"So far as the public land is concerned, over or through which these ditches for the canal were dug, the statutes above cited create no title, legal or equitable, in the individual or company that simply takes possession of such land. The government enacts that any one may go upon its public lands for the purpose of procuring water, digging ditches or canals, etc., and where rights have become vested and accrued which are recognized and acknowledged by the local customs, laws and decisions of courts, such rights are acknowledged and confirmed. Under this statute no right or title to the land, or to a right of way over or through it, or to the use of water from a well thereafter to be dug, vests, as against the government in the party entering upon possession from the mere fact of such possession unaccompanied by the performance of any labor thereon.

Undoubtedly rights as against third persons are acquired by priority of possession, and the government will and does recognize such rights as between those parties. This is the principle running

through the cases cited by the counsel for appellants. In Sullivan v. Northern Spy Mining Co., 11 Utah, 438, which is one of those cases, the priority of possession of the person who entered upon the public land and dug the well was recognized as thereby making a superior title to the use of the water from the well over that acquired by a person who was the subsequent purchaser of the land from the government. In that case the well had been dug, and the condition fulfilled. If no well had ever been dug, and a reasonable time for digging it had passed, the mere priority of possession would have given no superiority of title to the land over that acquired by the grantee from the government. It is the doing of the work, the completion of the well, or the digging of the ditch, within a reasonable time from the taking of possession, that gives the right to use the water in the well or the right of way for the ditches of the canal upon or through the public land. Until the completion of this work, or, in other words, until the performance of the condition upon which the right to forever maintain possession is based, the person taking possession has not title, legal or equitable, as against the government. What, if any, equitable claims, a party might have upon the government, who did a large amount of work, but finally failed to complete the necessary amount to secure the water or right of way, it is not necessary to determine or discuss. Those equities would not, in any event, amount to an equitable title to the right of way or to the use of the water, and so need not be here considered."

Let us suppose a case of conflict between an

association of persons proposing to enter separate sections or fractional parts of section of desert lands and to construct a canal and ditches for irrigating and reclaiming all of said tracts and a corporation such as the appellee in this case, claiming its rights under the territorial legislature. Upon what principle would these conflicting rights be determined? Would a corporation, prior in time under the territorial law, acquire a superior right as against an association subsequently formed under the act of Congress above quoted? If so, the grant from the territorial legislature is a better grant than one from Congress. If not, then the grant from the territorial legislature is of no validity whatever.

In the case of *United States vs. Rio Grande Dam & Irrigation Company*, 174 U. S., 790, this court, by way of comment on the effect of this legislation, said:

> "Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow. * * This legislation must be interrupted in the light of existing facts—that all through this mining region in the west were streams, not navigable, whose waters could safely be appropriated for mining and agricultural industries, without serious interference with the navigability of the rivers into which those waters flow. And in reference to all these cases of purely local interest the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention

to the common law rule, *which permitted the appropriation of those waters for legitimate industries.*"

In the same opinion this court said:

"Whether this power to change the common law rule and permit any specific and separate appropriation of the waters of a stream belongs also to the legislature of a territory, we do not deem it necessary for the purposes of this case to inquire. We concede arguendo that it does." (p.703).

In the case just quoted the court also said:

"To hold that Congress, by these acts, meant to confer upon any State the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated. It ignores the spirit of the legislation and carries the statute to the verge of the letter and far beyond what under the circumstances of the case must be held to have been the intent of Congress." (*pp.* 506-7).

Appellants insist that it is equally unreasonable to contend that Congress by this legislation intended to permit territorial legislatures to make grants of the surplus and unappropriated waters, not the property of the territories, because such grants are in derogation of the interests of all the people of the United States; tend directly to destroy the value of the public lands and to create a monopoly of the water supply, which is contrary to the policy of Congress, established by a long course of legis-

lation respecting the public domain. The local regulations to which Congress gave its assent are such regulations as permit the appropriation of waters for legitimate industries and does not extend to such regulations as permit a monopoly of the water supply for the purposes of speculation.

The object sought to be accomplished by the territorial legislature is not only not in harmony with the policy of Congress but is directly opposed to it.

Ferris vs. Higley, 20 Wall., 375.
Clayton vs. Utah, 132 U. S., 632.
Ex Parte Lothrop, 181 U. S., 113.

No effort has been made to present separately the questions arising in the cross action. If the judgment below is right as to the merits of the main case, it is undoubtedly right as to the cross-action and if it is erroneous as to the main case, it is likewise erroneous as to the cross-action.

It must be submitted that the judgment is erroneous and should be reversed and the cause remanded to the Supreme Court of New Mexico with instruction to dismiss the complaint and to award to appellants the injunction prayed for in the cross-complaint. All of which is respectfully submitted.

NEILL B. FIELD,
Counsel for Appellants.

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No. 16

Reply Brief of Appellants.

REPLY BRIEF OF APPELLANTS.

Filed Jan. 7, 1902.

No. 16.

In The Supreme Court

OF THE

United States.

OCTOBER TERM, A. D. 1901.

TOMAS C. GUTIERRES, ET. AL.
Appellants.
vs.
ALBUQUERQUE LAND & IRRIGATION COMPANY.

NEILL B. FIELD, ALBUQUERQUE, N. M.
Counsel for Appellants.

CITIZEN PRINT, ALBUQUERQUE, N. M.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1901.

No. 85.

TOMAS C. GUTIERRES, ET. AL. Appellants

vs.

ALBUQUERQUE LAND & IRRIGATION CO.

REPLY BRIEF OF APPELLANTS.

I

This Court has Jurisdiction to Review this Case.

Counsel for appellee, attacking the jurisdiction of this court, says:

> "We respectfully submit that the treaty was not held invalid by the court below, and the power of the Legislative Assembly of New Mexico to enact the legislation involved in this case was sustained, and that 'no authority exercised under the United States' *by appellants* was denied or questioned by the court below." *(Brief p. 4.)*

This court, construing the section of the statute under which this case is brought here, said:

> "It will be observed that this second section of the statute, while it is based upon the general principle which is found in the act of Con-

> gress allowing writs of error from this court to the highest courts of a State, namely, to protect parties against the exercise of an unlawful power on the part of the State authorities, does not use the language which is found in that act, that to give this court jurisdiction the decision of the State court must be AGAINST the right or power set up by the party under the laws of the United States. On the contrary, this peculiar feature of the appellate jurisdiction of this court over that of the State courts is left out when the matter comes to be applied to the Territories, and it is held sufficient that there should be drawn 'in question the validity of a treaty or statute of or authority exercised under the United States'; and it is not required that the decision of the State court should be against the validity of the treaty, statute or authority so exercised or claimed." (Clayton v Utah, *132 U. S. 637.)*

The "authority under the United States" which is called in question in this case is the authority of the Legislative Assembly of the Territory of New Mexico to pass the act under which appellee is incorporated. In the original brief filed on behalf of appellants, the contention is made that the right to carry water lies at the foundation of the right to construct the canal, and that the utility of the canal as a public agency depends upon the existence of the right to take the surplus waters from the Rio Grande, and that the right to construct the canal cannot exist independently of the right to divert and carry into and through it such waters. The nature of appellants' contention as to the want of power in the Territorial Legislature to pass the act in question appears to be misapprehended by counsel for appellee. Appellants call in question the power of the Legislature to pass Sub-section 4 of Section 17 of the act under which

appellee is organized, and contend that the portion of the act especially attacked is so vital in its character that the whole act must be declared void, if the power to pass this section is successfully challenged. Sub-section 4 is as follows:

> "To take and divert from any stream, lake or spring the surplus water, for the purpose of supplying the same to persons, to be used for the objects mentioned in section one of this act, but such corporations shall have no right to interfere with the rights of, or appropriate the property of any persons except upon the payment of the assessed value thereof, to be ascertained as in this act provided; And provided, further, That no water shall be diverted, if it will interfere with the reasonable requirements of any person or persons using or requiring the same, when so diverted." (*Laws of* 1887, *p.* 33.)

The courts below determined as matter of law that this power exists. Appellants challenge the correctness of that determination, and ask this court to review it. The conclusion of law presenting this question is as follows:

> "That the plaintiff, by the filing of its articles of incorporation with the Secretary of the Territory of New Mexico and complying with the provisions of the act under which it is incorporated, has acquired a right to construct its canals and reservoirs, to divert through its proposed canal surplus and unappropriated waters flowing in the Rio Grande, and that such right of eminent domain does not depend upon the ownership of lands by plaintiff or the employment of plaintiff prior to the construction of its canal by owners of lands to carry water for such owners." (*Transcript*, *p.* 36.)

The question thus presented is: Has the Territorial

Legislature authority to create a corporation and to authorize that corporation to make a valid appropriation of water which Congress has declared "shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes," without requiring that such corporation shall be the owner of lands to be irrigated or the agent of persons entitled to make beneficial use of the waters when diverted. Numerous decisions of this court support the contention that this raises what may be called for convenience a federal question.

But the validity of the treaty commonly known as the treaty of Guadalupe Hidalgo is also distinctly called in question in this case. Appellants rely upon certain rights which they allege are guaranteed to them and their predecessors in title, by the provisions of that treaty. But the court below found as matter of law:

> "That the defendants cannot lawfully set up in this action any rights secured to them and their associates or their predecessors in title by the treaty of Guadalupe Hidalgo and that the allegations of paragraph ten of the answer of the defendants with reference to the treaty rights of defendants—immaterial." *(Transcript, p.* 36.)

Looking to the opinion of the court for the reasoning by which this conclusion is supported, it distinctly appears that the courts below held the treaty to be invalid, i. e., legally ineffectual, as the basis of the rights relied on by the appellants. Those courts said:

> "The appropriation and distribution of water must be governed by similar laws, inasmuch as the United States has adopted its own system of water rights and adjusted the system to the different sections of the country as necessity required, and the laws of the States and Territories

> are in harmony therewith. These laws must govern wherein they differ from the treaty provisions, and wherein they are harmonious, treaty provisions need not be considered. The laws of the United States and the States and Territories are ample for the protecton of the rights of appropriators of water in this Territory, and remedies for impairment or destruction of such rights, are adequate also." (*Transcript, p.* 60.)

The validity of the treaty is therefore directly, and not incidentally, called into question.

Appellants respectfully submit that the jurisdiction of this court is not doubtful in view of its repeated decisions.

> *Maricopa R. R. v. Arizona*, 156 *U. S.* 347.
> *Clayton v. Utah*, 132 *U. S.* 632.
> *Lewis v. Pima County*, 155 *U. S.* 54.

II

The attempt to authorize the diversion of and sale as a commodity to whomever will buy, the surplus waters of the Rio Grande, interferes with the primary disposal of the soil and defeats the policy of Congress, as evidenced by its legislation.

Counsel for appellee in his brief says:

> "Whenever the title has passed, been conveyed by the sovereign, and the land has become private property, 'primary disposal of the soil has been made.' Thereafter any legislation relating thereto does not 'interfere with the primary disposal of the soil.'" (*Brief, p.* 4.)

Appellants without qualification assent to this proposition. They insist, however, that a law which attempts to vest in a private corporation waters which are essential to the irrigation of lands and without which the lands are valueless, interferes with the primary dis-

posal of those lands. They further insist that no legislation of Congress contemplates or sanctions the ownership or control of water for purposes of irrigation, by persons or corporations not the owners of the land to which the water is to be applied.

The entire subject of irrigation, the relation of water to land and of land to water, in the arid region, must be taken into consideration in order to determine the question here presented.

It is urged by counsel for appellee that no public lands are involved in this controversy, but it is not claimed that the right to control public waters is not thus involved.

Prof. Elwood Mead, the government expert on irrigation, in a recent bulletin issued by the Department of Agriculture, says:

> "Sooner than is generally realized the public or private ownership of Western rivers is destined to be one of the social and industrial questions of this country. *Their waters are worth more than the land public or private, through which they flow*, and the manner of their disposal will do more to shape Western civilization and promote or retard Western development than all other causes combined. The study of the duty of water is a study of the farmer's needs, and it is hoped that the presentation of these needs will tend to promote the creation of an irrigation system which will make the supplying of his necessities of first importance and be a matter of just pride to the nation." (*Bulletin No. 86, p. 46.*)

Appellants do not claim that the proposed canal of appellee crosses any portion of the public domain; indeed, the finding of the courts below is directly to the contrary. Those courts found:

XVIII.

"That some of the defendants and some of their associates are the owners of lands through which the plaintiff proposes to construct its canal." *Transcript, p.* 36.)

The contention is that the waters which appellee seeks to control belong either to the government of the United States or to appellants and their associates as riparian proprietors, and that they do not belong to the Territory of New Mexico, and, therefore, the Legislature has no more power to make a valid grant of them in the absence of legislation by Congress authorizing such grant than it would have to make a like grant of any portion of the public lands belonging to the government.

The fact that there are no public lands in the immediate vicinity of the canal is not only not controlling, but is not important; the United States are the owners of great bodies of land which may be irrigated with the waters of the Rio Grande, and to the extent that those waters are lawfully appropriated by appellee, the ability of the government to dispose of its lands, whether they lie above or below the canal, is impaired, for the reason that the purchaser from the government must acquire his right to water subject to all valid prior rights whether initiated above or below him on the stream.

Appellants and their associates are the owners of lands riparian to the Rio Grande, and as such have well-defined rights to the waters which appellee is seeking to divert and appropriate. They do not question the applicability of the doctrine of prior appropriation, in the determination of all controversies respecting rights to the use of water, for purposes of irrigation, in New Mexico. They claim, however, that the right of the riparian proprietor is superior to every other right than

that acquired by lawful prior appropriation, and insist that appellee is not authorized by law, and cannot be authorized by law to make such lawful appropriation; in other words, appellants resist any interference by appellee with their rights as riparian proprietors, and also claim the right to enlarge their present appropriation of water as their necessities may require free from such interference. They insist that water for the purposes of irrigation becomes, when applied to land, appurtenant to the land to which it is applied, and that any attempt to substantially change the application of the water necessarily results in the loss of the right to use it.

If appellee, not being the owner of any lands, may lawfully divert the surplus waters of the Rio Grande and sell the same to whomever will buy them, it must be because such waters in the control of appellee are a mere commercial commodity subject to constant change in the place of application, and do not become appurtenant to any land by virtue of use upon it.

There is a very important difference between the nature of the uses of water, and consequently, between the rights of those who appropriate water for its power as in hydraulic mining, and those who appropriate it for purposes of irrigation, but some of the early cases appear to treat the rights of all appropriators, whether for mining, manufacturing, or for irrigating purposes, as completely analogous.

If the policy of the government as evidenced by the legislation of Congress is not to be defeated, the difference in the nature of these uses, and of the rights of the users, must not be lost sight of.

For mining, the use of water is strictly mechanical. It is mechanically applied for its power, and as each

cubic yard of earth is subjected to this mechanical process of hydraulic mining, the purpose of that process has been served, and the mechanical power of the water is applied to the next cubic yard, and so on, until the entire field has been subjected to the process, and the use of water for that particular purpose in that particular locality has ceased to be beneficial. From this it follows that the appropriation of water for mining purposes necessarily involves the idea of a constantly changing place of use. Without the right thus to change the place of use, the right of appropriation for mining purposes would be of little value.

The use of water for irrigation, on the contrary, involves the idea of its constant application, year after year, to the same tract of land. The use is not in any sense a mechanical one. The element of force or power does not concern the irrigator of land except to the mere extent that it serves to convey the water to him. That is, by the force of gravity, water will deliver itself from a source higher in elevation than a point at which its use is desired, to that point.

Therefore, the analogy between the rights of one who has appropriated water for mining, and one who has appropriated water for irrigation completely fails when we come to consider whether the use of water thus appropriated may be changed.

The policy of the general government has been to encourage hydraulic mining, and to accomplish this, it is absolutely necessary that the miner should have the right to change the application of the water, as has been shown. To deny him this right is to defeat rather than to encourage mining enterprises. The authorities are quite uniform as to the right to change the place of

use of water appropriated for mining purposes. In an early California case the Supreme Court of that State said:

> "The next question that arises in this case is, whether a party who makes a prior appropriation of water can change the place of its use, without losing that priority as against those whose rights have attached before the change. This question, we think, can admit of but one answer. It would seem clear that a mere change in the use of water, from one mining locality to another, by the extension of the ditch, or by the construction of branches of the same ditch, would by no means affect the prior right of the party. *It would destroy the utility of such works were any other rule adopted.* As to the question whether a party can change the use of the water from one purpose to another, without affecting his prior right, we express no opinion, as the point does not arise in this case."
> (*Macris v. Bicknell*, 7 *Cal.* 264.)

There appears to have been no departure from the rule here enunciated by the courts of any of the Pacific States and Territories, but at least one court, the Supreme Court of Colorado, has refused to recognize the distinction insisted on by appellants, and holds that the rule is applicable to every appropriation of water, whether for mining, manufacturing or irrigation. That court distinctly refuses its assent to appellants' contention.

> *Strickler v. City of Colorado Springs*, 26 *Pac. Rep.* 313.

There are dicta in later California cases which indicate a leaning by that court in the same direction, but the question has not been distinctly passed on in California.

The United States Circuit Court for the District of Nevada has said:

> "A party having obtained the prior right to the use of a given quantity of water, is not restricted in such right to the use or place to which it was first applied. It is well settled that a person entitled to a given quantity of the water of a stream may take the same at any point on the stream, and may change the point of diversion at pleasure, and may also change the character of its use, if the rights of others be not affected thereby."
>
> *Union Mill. and M. Co. v Dangberg, 81 Fed. 115.*

The question did not necessarily arise in the case last cited, and the decision went upon other grounds. Of the numerous cases cited by the court in support of the proposition, only the Colorado case appears distinctly to decide the point. Appellants insist that the Colorado court attempts to support its conclusion by reasoning founded in common-law principles which have no application to water rights in the arid region.

These courts appear to lose sight of the fact that the waters, the right to the use of which is conferred by law, are public waters, and that the right is conferred in pursuance of a well-established policy which these decisions have a direct tendency to defeat.

The policy of the general government from the time of the acquisition of this arid region has been to encourage agriculture, and to effectuate this policy, the right to change the place of application of water, appropriated for this purpose, must be denied. To illustrate: The desert land act provides that a citizen of the United States may settle upon and acquire a title to 320 acres of land, upon condition that he will reclaim it from its

desert character by the application to it of water. A nominal price is affixed to the land, and license is given to appropriate any waters of the public streams for the purpose of reclamation and cultivation. The desire of the government to have these lands reclaimed lies at the foundation of its liberality to settlers.

To say that the water so appropriated for the reclamation and cultivation of that land, is not appurtenant to it, is to make possible a direct fraud upon the government and to defeat its manifest purpose. This is easily demonstrable. Suppose that in a stream in the territory there is a volume of water flowing, sufficient to irrigate 320 acres of land and no more. "A" locates 320 acres of land, diverts this water and appropriates it to the reclamation of that land. He then in due course of time, prescribed by the statute, makes proof and obtains a patent from the government. His right to appropriate the water depends on his possession of the land, and his right to the possession of the land depends upon the existence of the water necessary to reclaim it. Neither right can exist alone, and with the loss of one the other fails.

It seems illogical to say that rights to land and water thus acquired are separable, and that the settler may, as soon as he has acquired an indefeasible title to the land, and the right to use the water for its reclamation, segregate the water from the land, and sell the right to use it to another, who may acquire a title to another 320 acres of land from the government by applying the same water to it; a process which may be indefinitely repeated until any quantity of land may be thus acquired, upon a water supply sufficient only for the reclamation and cultivation of 320 acres of land.

Why should the government require a settler to "ex-

hibit a plan showing the mode of the contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation," if the water right may be segregated from the land and transferred to enable another to obtain title to other lands from the government in direct violation of the spirit and intent of the act under which title is acquired. Can it be imagined that any plan of irrigation contemplating or disclosing a right to the use of water temporarily, or a right less than a permanent one, would be accepted by the government as a basis of title under the desert land act?

While the provisions of the desert land act afford convenient means of illustrating the contention of appellants, the reasoning by which this contention is maintained applies with equal force to the homestead and other public land laws.

It is obvious that the same waters are the subject of legislation on the part of Congress and the Territorial Legislature, and that in case of conflict the territorial legislation must be held void. In the original brief (*p.* 92) appellants have attempted to show that there is nothing in the desert land act, as amended, from which it can be inferred that Congress has delegated to the Territorial Legislature authority to pass the act under which appellee is incorporated.

The act of July 26, 1866 (14 *Stat.* 253), compiled as section 2339 of the Revised Statutes, provided for the protection of "*rights to the use of water* for mining, agricultural, manufacturing and other purposes, only in cases where such rights *to the use* have become vested and are recognized and acknowledged by the local cus-

toms, laws and the decisions of the courts."

This language by no possible rule of construction can be made to include the right to divert water, and sell it as a commodity to whomever will buy it. There is no ambiguity about the language used by Congress, and the nature of the right intended to be protected is perfectly clear. Whether, as has been declared by this court, this legislation was the mere recognition of a pre-existing right, or whether it was a relinquishment of the rights of the government, amounting to a grant, it is entirely clear that a person (or corporation) invoking the protection of this legislation, must, in order to be within its provisions, establish the following proposition: *(a)* that by priority of possession he (or it) has acquired *rights to the use of water* for mining, agricultural, manufacturing or other purposes; *(b)* that such rights have vested and accrued; and *(c)* that such rights are recognized and acknowledged by the local customs, laws and decisions of the courts.

Appellee has not established, and the findings of the courts below, do not establish any one of these three conditions, and, therefore, the further consideration of this act becomes unnecessary.

Counsel for appellee claims in his brief that "Congress has expressly authorized territorial legislatures to create corporations by general laws for purposes of irrigation." He quotes section 1889 R. S., and says: "It would be impossible for the corporations authorized by this section to accomplish the objects of their creation, unless vested with the right to condemn property whenever the use to which it is put is a public purpose." (*Brief, p.* 6.)

Sec. 1889, *Rev. Stat. U. S.* as amended by the acts of June 8th, 1878 (20 *Stat. L., p.* 101), of July 30th,

1886 (24 *Stat. L. p.* 170), and of July 19th, 1888 (25 *Stat. L. p. 336.)* while specifically authorizing the creation of corporations for "the construction or operation of * * * irrigation ditches, and the colonization and improvement of lands in connection therewith," does not authorize the creation of such corporations with the power to divert and sell waters to whomever will buy them.

Congress has not authorized the creation of corporations for the construction or operation of irrigating ditches for the sale of water for speculative purposes, but only in connection with the colonization and improvement of land.

Perhaps it is true that the language of section 1889 as amended, standing alone, would give color to the contention of appellee, but it is certainly true that, when taken in connection with the other legislation of Congress on the same subject, and considered in the light of the settled policy of Congress, to prevent the monopoly of water supply, it becomes clear that the true construction is as contended for by appellants.

If this is the true construction of this section, as amended, the act of the Territorial Legislature is wholly unauthorized, and this case is clearly within the principles laid down by this court in numerous cases, notably, the case of *Lewis v. Pima County*, in which certain bonds of the County of Pima in the Territory of Arizona were held, by this court, to be void because issued under an act of the Legislature of Arizona, which is in violation of the restrictions of this legislation by Congress.

In the Pima County case bonds were issued, in aid of a railroad, as required and directed by a mandatory act of the Territorial Legislature, and Mr. Justice

Brown, speaking for this court, said:

> "The question is too clear for extended argument. By the 'internal affairs' of a municipal corporation, in the administration of which the Legislature could alone authorize it to incur a debt, was undoubtedly intended such business as municipalities of like character are usually required to engage in to fulfill their proper functions, and to effectuate the object of their charters. In the case of counties these are ordinarily to provide a court-house for the administration of justice; a jail for the confinement of prisoners; a poor-house for the sustenance of paupers (where by local law they are made chargeable upon the county); offices for the various officials of the county; and, under certain circumstances, highways and bridges for the accommodation of the public. It could never have been contemplated, however, that this power would be used to incur obligations in favor of a railroad operated by a private corporation for private gain, though also subserving a public purpose. The record before us does not show whether this railroad was designed to extend beyond the limits of the county; but if the county had power to issue its bonds in aid of railroads at all, there is nothing to indicate that such power was restricted to such roads as were wholly within the county, and if this act were a valid exercise of the authority of the Legislature, the credit of the county might be indefinitely pledged for the construction of railways extending far beyond the county limits, and, indeed, for carrying out any such schemes of public improvement as the Legislature could be persuaded to authorize. Clearly such debts would not be incurred in the administration of the internal affairs of the county."

Lewis vs. Pima County, 155 U. S. 57.

Another case is that of *United States v. McMillan*, 165 *U. S.* 504, in which this court held a fee bill enacted by the Legislature of the Territory of Utah for the purpose of fixing the compensation of clerks of the District Courts in that Territory to be in conflict with the legislation of Congress upon the same subject in so far as the clerks were authorized to retain to their own use moneys collected under the territorial fee bill, instead of paying the excess of all fees and emoluments received by them, under both statutes, into the treasury of the United States. As a result of this decision, Congress amended the existing law. (2 *Sup. R. S. No.* 8, *p.* 880.)

In *Clayton v. Utah*, 132 *U. S.* 632, an act of the Legislative Assembly of the Territory of Utah providing for the election of a territorial auditor by the people was held to be, as to that provision, in conflict with the organic act and void.

Mr. Justice Miller, delivering the opinion of this court, said:

> "It is true that in a case of doubtful construction the long acquiescence of Congress and the general government may be resorted to as some evidence of the proper construction, or of the validity, of a law. This principle is more applicable to questions relating to the construction of a statute than to matters which go to the power of the Legislature to enact it. At all events, it can hardly be admitted as a general proposition that under the power of Congress reserved in the organic acts of the Territories to annul the acts of their Legislatures the absence of any action by Congress is to be construed to be a recognition of the power of the Legislature to pass laws in conflict with the act of Congress under which they were created. * * * * *

> We do not think that the acquiescence of the people, or of the Legislature of Utah, or of any of its officers, in the mode for appointing the auditor of public accounts, is sufficient to do away with the clear requirements of the organic act on that subject."

Unless it can be established that Congress has delegated to the Legislatures of the Territories unlimited authority and control over the public waters within their respective territories, the vital test of the validity of territorial legislation affecting such waters must be, is it consistent with the legislation of Congress?

Unless Congress has expressly, or by necessary implication, sanctioned the control of water for purposes of irrigation by corporations having no interest in the lands to be irrigated, the attempt by the Legislature of New Mexico to authorize the creation of corporations to own and control waters in the manner which the courts below have held the appellee may do, must be held to be not within the power of the Territorial Legislature. That Congress has authorized the Legislative Assemblies of the several Territories by general incorporation acts to permit persons to associate themselves together as bodies corporate "for the construction or operaton of * * * * * irrigating ditches and the colonization and improvement of lands in connection therewith," is but evidence of the general policy of Congress insisted upon by appellants, but it is impossible to derive from such authorization power to create corporations designed and intended to monopolize the public water supply, and to control the same for purely speculative purposes.

If there are surplus and unappropriated waters in the Rio Grande, the policy of Congress, and every consideration of justice demand that those waters shall con-

tinue to flow in the stream as they have been accustomed to flow, until such time as the owners of lands see fit to divert and appropriate them for purposes of irrigation, or until such time as they may be diverted and appropriated for mining or manufacturing purposes, by persons or corporations desiring to make a beneficial use of them. They cannot without violating the laws of Congress be made the subject of private speculation by a corporation such as appellee, which would divert them and sell them for profit to whomever would buy.

Appellants beg to repeat the citation of cases in which this court has held territorial legislation invalid because in conflict or inconsistent with the legislation of Congress.

Ferris v. Higley, 20 *Wall* 375.
Lewis v. Pima County, *155 U. S.*, *57*.
Clayton v. Utah, 132 *U. S.* 632.
U. S. v. McMillan, 165 *U. S.* 504.

III.

While the proposition is not distinctly stated, it seems to be the contention of counsel for appellee that the doctrine of prior appropriation, as established in the arid region, completely supersedes all riparian rights. He says in his brief:

> "It would seem that appellants are basing their contention upon the theory that the common law in this respect obtains, although the proposition is not definitely stated. Many of the authorities cited in the brief are from states where the common law in that particular prevails. It is, of course, important in this case. If the law of prior appropriation prevails, and we insist that it does, the appellee has the right to divert surplus water from the river. The Legislature could confer upon it the power to do so,

provided the diversion was for a public purpose, and a beneficial use was made of the water." (*Brief, p.* 13.)

The doctrine of prior appropriation was not called into being by the influx of Americans into California and Nevada occasioned by the discovery of gold in those states. While the enormous importance of water as an agency in mining gold was then first demonstrated and new questions were presented for solution by reason of this importance, it is yet true that the doctrine of prior appropriation of waters, for purposes of irrigation, has existed for centuries, and riparian rights subordinate to, but contemporaneous with, the right of prior appropriation, have been recognized during all that time.

The doctrine of prior appropriation, as it prevails in the Pacific States and Territories, is well stated by Judge Hawley as follows

> "The truth is that under the principles of the common law in relation to riparian rights, if applicable to our circumstances and conditions, there must be allowed to all, of that which is common, a reasonable use. But, if prior appropriation is to prevail, then different rules must be applied. Under the principles of prior appropriation, the law is well settled that the right to water flowing in the public streams may be acquired by an actual appropriation of the water for beneficial use; that, if it is used for irrigation, the appropriator is only entitled to the amount of water that is necessary to irrigate his land, by making a reasonable use of the water; that the object had in view at the time of the appropriation and diversion of the water is to be considered in connection with the extent and right of appropriation; that, if the capacity of the flume, ditch, canal or other aqueduct, by means of which the water is conducted, is of

greater capacity than is necessary to irrigate the lands of the appropriator, he will be restricted to the quantity of water needed for the purpose of irrigation, for watering his stock, and for domestic use; that the same rule applies to an appropriation made for any other beneficial use or purpose; that no person can, by virtue of his appropriation, acquire a right to any more water than is necessary for the purpose of his appropriation; that if the water is used for the purpose of irrigating lands owned by the appropriator, the right is not confined to the amount of water used at the time the appropriation is made; that the appropriator is entitled, not only to his needs and necessities at that time, but to such other and further amount of water within the capacity of his ditch, as would be required for future improvement and extended cultivation of his lands, if the right is otherwise kept up; that the intention of the appropriator, his object and purpose in making the appropriation, his acts and conduct in regard thereto, the quantity and character of land owned by him, his necessities, ability and surroundings, must be considered by the courts, in connection with the extent of his actual appropriation and use, in determining and defining his rights; that the mere act of commencing a ditch with the avowed intention of appropriating a given quantity of water from a stream gives no right to the water unless this purpose and intention are carried out by the reasonable, diligent, and effectual prosecution of the work to the final completion of the ditch, and diversion of the water to some beneficial use; *that the right acquired by the appropriator must be exercised with reference to the general condition of the country and the necessities of the community, and measured in its extent by the actual needs of the particular purpose for which the appropriation is made, and not for the purpose of obtaining a monopoly of*

> *the water*, so as to prevent its use for a beneficial purpose by other persons; that the diversion of the water ripens into a valid appropriation only where it is utilized by the appropriator for a beneficial use; that the surplus or waste water of a stream may be appropriated, subject to the rights of prior appropriators, and such an appropriator is entitled to use all such waters; that, in controversies between prior and subsequent appropriators of water, the question generally is whether the use and enjoyment of the water for the purpose for which the water is applied by the prior appropriator have been in any manner impaired by the acts of the subsequent appropriator."
>
> *Union M. & M. Co. v. Danberg, 81 Feb. 94-5.*

The doctrine as thus stated seems to be an enlargement, out of the doctrine as it was known to the Spanish law. The difference is no greater than we should expect to find when we consider that it was the application of an old doctrine to new conditions. So far, however, as the reports of decided cases disclose, even in California, from the earliest time of its application to mining conditions there, it was never invoked to destroy or impair vested rights. Riparian rights yielded to the right of prior appropriation, in case of a conflict between the two rights, as to the surplus water of a stream, but nothing less than a valid appropriation was permitted to disturb or interfere with the right of a riparian proprietor.

> "The Superior Court did not err in enjoining the plaintiffs from diverting the whole amount of water appropriated by them for purposes of irrigation at times when it is found they could not use it beneficially for that purpose, and when, as a necessary consequence, it would run to waste on non-riparian lands. The extent of an appro-

> priation is limited not by the quantity of water diverted, but by the quantity which is, or which may be, applied by the appropriator to a beneficial use; and as to any surplus the riparian proprietor below the point of diversion has a right to demand that it should flow in the stream as it has been accustomed to flow."
> *Barrows v. Fox, 98 Cal. 66.*

The Supreme Court of California has rigidly administered the common law doctrine of riparian rights, but the same court as rigidly protects the rights of appropriators of public waters where such rights were acquired under the public land laws of the United States, before the lands through which the waters ran had passed to private ownership, or while the lands remained the property of the State, and waters were appropriated under the provisions of State laws. The case of *Lux v. Haggin*, 69 *Cal.* 255, contains a luminous discussion of the entire subject.

In the case at bar it seems to be contended by counsel for appellee that the laws of the United States relating to the public domain have no application to this controversy. He says in his brief:

> "It is to be presumed from the contention of appellants in this case that their title, if any, came from Spain or Mexico. The appellants insist that they had vested rights in the land and water which are protected by the treaty of Guadalupe-Hidalgo against any right which the Legislature of New Mexico could confer upon the appellee to exercise the right of eminent domain or divert water. If this is true, these lands must have been private property at the time of making of the treaty and the laws of the United States applicable to the public domain can have no application." *(rief, p. 910.)*

Appellants contend that under the Spanish and Mex-

ican law, the waters of all rivers were public property to be administered and distributed for the use of the inhabitants of the country through which they ran; that the doctrine of riparian rights existed under those laws, but only in a limited and qualified way; that they were subject to be defeated by the appropriation of the waters of the river for beneficial uses. The riparian proprietor could not interfere with, or prevent the diversion of waters which were appropriated in accordance with established customs, but to accomplish such appropriation, and override the rights of the riparian proprietor, application of the water to a beneficial use was essential. The rights which appellants seek to vindicate in this case, according to their contention, have existed for centuries, and if they understand the position of counsel for appellee it is, that the Legislature of the Territory of New Mexico may, by legislation initiated by it, without the express authority of Congress, destroy those rights. If the contention that the laws of the United States have no application, is well founded, it logically follows, in order to sustain this legislation, that the Legislature has power to deprive appellants of rights which are, in effect, conceded to have existed prior to the treaty of Guadalupe-Hidalgo.

In the original brief appellants have attempted to show by reference to Escriche, and to Hall's Mexican Law, the general nature of these rights. They beg now to submit some quotations from Hall's Mexican Law in support of their contention that as riparian proprietors they have a right to the water which is sought to be controlled by appellee.

> "A riparian proprietor can alienate the right to take water by renunciation, cession, sale, or in any other manner, in favor of the proprietor of the other side or the lower proprietor; and if,

holding two estates, he gives one away, he may reserve the exclusive right of using the water for that which he preserves, or to concede it for that which he alienates. A riparian owner can likewise acquire with respect to another the exclusive right to the water by means of prescription."

(*Hall's Mexican Law, Sec.* 1396.)

"A riparian owner cannot, without the consent of the other riparian owners interested, concede to a third party, to the injury of the former, the power to take water in the same current or on his estate; nor use himself the water to irrigate other lands which belong to him, but which are not situated on the same bank; although this right may be acquired by prescription. When one riparian estate is divided between co-owners or joint owners, so that the parts which are designed or adjudicated to some of them, and which form now so many other estates not bounded by the stream, both preserve notwithstanding their right to the water in the same form which they held it before the division, although nothing should have been stipulated on this matter." (*Id.* 1397.)

If these lands and waters were private property at the time of the ratification of the treaty, no legislation by the Legislature of New Mexico could impair the rights of the owners of that property. Under our system of government the right to acquire private property by appropriation cannot be conferred. Legislation attempting to confer the right to divert these waters can be defended only upon the theory that the waters are not private property, but are subject to public control. They can be held to be subject to public control on one or the other of two grounds, and not otherwise: First, because they were subject to public control under the laws of Mexico and Spain, and the United States have

succeeded to all the sovereign powers of Mexico, which had succeeded to the powers of Spain; or, second, because the United States own the lands through which they run, and ownership of the lands carries with it ownership of the waters.

Is there any other ground upon which the right to legislate with reference to these waters can be based? Appellants insist that there is not, and that their contention that the Spanish and Mexican laws control, must be accepted, or the principles laid down by this court in the case of *Sturr v. Beck*, must be applied. The Chief Justice, speaking for the court in that case, said:

> "The 9th section of the act of 1886 is referred to by Mr. Justice Field in Atchison v. Peterson, 20 Wall 507-512, and in the opinion it is said that 'the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common law doctrine of riparian proprietorship with respect to the waters of those streams.' When, however, the government ceases to be the sole proprietor, the right of the riparian owner attaches, and cannot be subsequently invaded. As the riparian owner has the right to have the water flow 'ut currere solebat', undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriation of both land and water it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect."
> (*Sturr v. Beck*, 133 *U. S.* 551.)

Appellants are not contending for the rule of the common law, with reference to riparian rights. They insist upon the rule of the civil law, which was the law of Mexico, under which as they understand it these

waters could not be granted away for purposes of speculation and pecuniary profit, under which their right to have these waters flow as they were wont to flow can be interfered with only by an appropriator who seeks to make a beneficial use of them.

Appellants insist that in the valley of the Rio Grande the rule has always been that water once appropriated to the irrigation of land becomes appurtenant to that land, in such way that it cannot be segregated from it except by restoration to the common mass, to be again subject to be appropriated in accordance with the requirements of the law. They assert with some degree of positiveness that no recorded instance can be found during the centuries in which irrigation has been practiced in the valley of the Rio Grande of an attempt to segregate water from land by the sale or transfer of a water right separate and apart from the land to which it has been previously applied.

It is a matter of common knowledge that in the valley of the Rio Grande water rights pass by deed with the land to which the water has been applied, without special mention in the conveyance. This is a rule of such universal application that, so far as the writer has been able to ascertain, no case in which it was questioned has ever been before the courts of New Mexico. By statute in the State of California the same rule is established, but the provision of the code of that State on this subject is, in common with numerous other provisions, merely declaratory of existing rights. It is difficult, if not impossible, to reconcile the decisions of the Supreme Court of California upon this and analogous questions, but in a case decided in 1892, that court decided, and it appears not to have departed from the rule then laid down, that water would pass by conveyance

of land as appurtenant to it. The case to which reference is made was an extreme one, because the ditch through which the water was carried terminated a long distance from the land conveyed, and the water was taken from the termination of the ditch, across the adjacent land, partly without right, and partly under a revocable license. That court said:

> "Miller sold and conveyed the land, with the appurtenances, to plaintiff, May 3, 1886, and his interest in the ditch to defendant, March 14, 1887, plaintiff's deed being then on record. The water was necessary to the proper use of Miller's land. It is evident that the appropriation was made and the ditch constructed to bring the water there for that purpose, and for no other; and further, that through these means the water had been so brought and actually used upon the land for some years, and was being so used at the time of the conveyance to plaintiff.
>
> "Appellant concedes that had the ditch been continued by the parties to Miller's land, the water would have been appurtenant to it, but inasmuch as this ditch is more than half a mile away, and Miller has received his share of the water through Hurtt's land without any right at all, and through Crooker's by a license which may be retracted at any time, the water was not used on this land by right, and therefore did not and could not be appurtenant to it, under section 662 of the Civil Code, which reads: 'A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or water-course, or of a passage for light, air, or heat from or across the land of another.' But that which is claimed as an appurtenant here is not the easement of a right of way over the lands of Hurtt and Crooker, but the water right which undoubtedly did belong to Miller and was used by right

as an incident to his land. At the time of his conveyance he got the water through Crooker's ditch by his (Crooker's) consent. Hurtt had presumptively, at least, licensed this use of his land for Crooker's ditch. If so, he could not object that it was made to carry additional water, unless this increased the burden to his land; that is, made the ditch in some respect more injurious to his estate. It does not appear that it did so. He was then using the water by right within the claim of appellant. But, in my opinion, the vendor cannot raise the question as against his vendee. The water belonged to Miller by appropriation. It was acquired for use upon this land, and the land could not be so advantageously used without it. It had been, and at the time of the sale was, being so used by the vendor. It had become an adjunct to this land, and the vendor cannot raise the question that he had not an indefeasible title to the right of way."
(*Crooker v. Benton*, 93 *Cal.* 368-9.)

The idea that water could be appropriated for purposes of speculation and profit seems to be of very recent origin, but it has in the few years since it was first promulgated produced some astonishing results. Mr. Charles F. Lummis, of Los Angeles, Cal., a writer of recognized ability, commenting on facts disclosed by Bulletin 100, Department of Agriculture, office of Experiment Station, 1901, entitled "Irrigation Investigations in California," says:

"Every stream was over-appropriated, many times the total flow being usually claimed. In one of the northern valleys, where, at the utmost, the supply would suffice for 150,000 acres, enough water was 'appropriated' to irrigate over 200,000,000 acres. On the San Joaquin River the amount claimed was 172 times the normal flow. Similar abuses were found on every stream within the scope of the investigation. *

> * * * * * * * * * One man claimed 'the entire flow of the San Joaquin from its surface to the centre of the earth.' His point of diversion was 'immediately opposite a white oak tree on the right bank of the stream.' A man on the Los Angeles served notice that he appropriated '3,000 miners' inches under a 4-inch pressure, to be taken out in a pipe one and one half inches in diameter."

The information contained in this bulletin No. 100 is of the greatest value, not only for the store of facts not otherwise obtainable, but for the observations of Prof. Mead as well.

The practical application of scientific knowledge to the business of irrigation is the need of the hour in the arid West. Upon it depends the future of a great empire. At present there exists no serious obstacle to the establishment, in New Mexico at least, of the doctrine for which appellants contend; which may be said to be the doctrine of public control (and to forbid private control) of the water supply. So far as is known to the writer, there is not in the entire Territory of New Mexico a single canal which was constructed upon the theory for which appellee contends; not a canal which does not belong to the owners of the lands irrigated from it, or the owners of which did not originally own the lands it was intended to irrigate; in other words, that there is not a canal constructed by a corporation under the provisions of the act of 1887, which claims the rights which the courts below have adjudged to the appellee in this case, unless it be the proposed canal of the Rio Grande Dam and Irrigation Co., the rights of which latter company are at present the subject of litigation in this court.

It is proper to state that none of the questions insisted on by appellants in this case are raised in the

case last referred to.

While this court will, of course, administer the law as it finds it to be, appellants respectfully urge that the claims of appellee should not commend themselves to this court in the absence of controlling legal principles supporting them. If the right to divert water for purposes of irrigation may be conferred on persons or corporations not interested in the cultivation of the soil, it will be but a short time until canal companies will control our agriculture with the same results which attend such a condition in other countries.

Prof. Mead says:

> "Spanish water laws are the outcome of a thousand years' experience, in which local customs widely different in character have long operated side by side in different districts of the same province. There has been time enough to work out to a final result the influence of different doctrines of water ownership. In Valencia, the most beautiful and prosperous irrigated section of Spain, the works date back to the Moors. Water rights are founded on customs which are older than records. Water and land are inseparable. Every writer who has studied the subject is of the opinion that the thrift, the skill, and success shown by farmers come from the peace and security which goes with the control of both elements of production. In the same province the results of the separate ownership of water and land are as completely manifest. In the district of Elche water was originally controlled by the land owners, but land and water were not inseparable. Gradually water rights were brought up by outsiders. Now the farmer buys water from these owners of streams just as he does fertilizers. The water tolls have been raised, farmers impoverished, and all progress and prosperity banished. In the province of Mercia water is attached to the land and farmers

> are prosperous. In Lorca land and water are separated, and the result, says a recent report, is 'large profits for the water owners, poor farmers, and languishing agriculture.' "

The Royal Commission on Water Supply, appointed by the government of Victoria, in Australia, studied water history in three countries of Europe with this result:

> "Italian experience, French experience and Spanish experience all go to show that the interests to be studied in relation to irrigation schemes are so many and so various, and so intimately bound up with the public welfare, that State control is imperatively necessary, and that for the protection of its citizens no monopoly can be permitted which would separate property in water from property in the land to which it is applied."

All of which is respectfully submitted,

NEILL B. FIELD,
Counsel for Appellants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

TOMAS C. GUTIERRES ET AL., APPELLANTS, v. ALBUQUERQUE LAND AND IRRIGATION COMPANY.	*No.* 85.

BRIEF OF APPELLEE.

I.

Appellee deems it unnecessary to make any statement of facts in this case. Counsel for appellants, on page 13 of his brief, has stated that "we are concerned with only "the fourteenth, fifteenth, sixteenth, and eighteenth find-"ings of fact by the court below," and quotes them. Upon those he bases his contention, and it is unnecessary to repeat them. We therefore proceed to discuss the propositions of law raised by appellants, and refer to the findings and opinion of the court below for a statement of the facts.

II.

This court has no jurisdiction to hear and determine this case. Counsel for appellants contend that jurisdiction is vested in this court under the act of March 3, 1883 (23 Stats. at Large, 443), because "the validity of a "treaty" of the United States and of "an authority exer- "cised under the United States is called in question."

There is no affidavit or other proof in the record to show that *the matter in dispute, exclusive of costs*, exceeds the sum of five thousand dollars. The jurisdiction must therefore depend upon the nature of the questions involved.

Under the decisions of this court it is clear the validity of the treaty of Guadalupe Hidalgo is not involved.

The supreme court of New Mexico has not held that treaty to be invalid. A construction of the treaty or of a statute, or of rights claimed thereunder, is not a holding that the treaty or statute is invalid.

Ferry *v.* King County, 141 U. S. 668.

In Baltimore and Potomac Railroad *v.* Hopkins, 130 U. S. 224, this court said:.

"Whenever the power to enact a statute, as it is by its "terms, or is made to read by construction, is fairly open "to denial and denied, the validity of such statute is drawn "in question, but not otherwise."

In Linford *v.* Ellison, 155 U. S. 508, this court discussed the jurisdiction under the act of 1885 fully and said:

"It is thus seen that the decision of the Supreme "Court of the Territory involved the construction of the "organic law and the scope of the authority to legislate con-

"ferred upon the Territorial Legislature; but that the va-
"lidity of that authority and of the statute was not drawn in
"question. In order to give us jurisdiction of this ap-
"peal the matter in dispute, exclusive of costs, must
"have exceeded the sum of $5,000, or else, without re-
"gard to the sum or value in dispute, the validity of a
"patent or copyright must have been involved, or the
"validity of a treaty or statute of, or an authority exer-
"cised under, the United States, have been drawn in
"question. (Act of March 3, 1885, C. 355, 23 Stat. 443.)
"Confessedly, the matter in dispute here did not reach
"the requisite pecuniary value, and the validity of no
"patent or copyright was involved, nor was the validity
"of a treaty questioned; and, as just stated, we are of
"opinion that the validity of no statute of the United
"States, nor of an authority exercised under the United
"States, was drawn in question within the intent and
"meaning of the jurisdictional act. As was observed in
"Lynch *v.* United States, 137 U. S. 280, 285: 'The valid-
"'ity of a statute is not drawn in question every time rights
"'claimed under such statute are controverted, nor is
"'the validity of an authority every time an act done by
"'such authority is disputed. The validity of a statute
"'or the validity of an authority is drawn in question
"'when the existence or constitutionality or legality of
"'such statute or authority is denied, and the denial
"'forms the subject of direct inquiry.' In Baltimore
"and Potomac Railroad *v.* Hopkins, 130 U. S. 210, the
"question in controversy was whether a railroad corpora-
"tion, authorized by acts of Congress to establish freight
"stations, and to lay as many tracks as 'its president and
"'board of directors might deem necessary' in the Dis-
"trict of Columbia, had the right to occupy a public street
"for the purposes of a freight yard. It was argued that the
"validity of an authority exercised under the United
"States to so occupy the public streets was drawn in
"question; but the courts held otherwise and said: 'The
"'validity of the statutes and the validity of the authority
"'exercised under them are in this instance one and the
"'same thing, and the "validity of a statute," as these words

" ' are used in this act of Congress, refers to the power of
" ' Congress to pass the particular statute at all, and not
" ' to mere judicial construction as contradistinguished
" ' from a denial of the legislative power.' And see South
' Carolina *v.* Seymour, 153 U. S. 353, where the cases
" are marshalled and applied."

The case cited above, South Carolina *v.* Seymour, fully reviews the decisions of this court. We respectfully submit that the treaty was not held invalid by the court below, and that the power of the Legislative Assembly of New Mexico to enact the legislation involved in this case was sustained, and that "no authority exercised under "the United States" by appellants was denied or questioned by the court below.

III.

The act of the Territorial Legislature authorizing the creation of corporations to construct and maintain reservoirs, ditches, and pipe lines, and conferring upon such corporations the right of eminent domain, is not an interference with the primary disposal of the soil.

Whenever the title has passed, been conveyed by the sovereign, and the land has become private property, "primary disposal of the soil has been made." Thereafter any legislation relating thereto does not "interfere "with the primary disposal of the soil."

Gibson *v.* Chouteau, 13 Wall. 99.
Henshaw *v.* Bissell, 18 Wall. 255.
King *v.* Thomas, 6 Montana, 409.

It would seem clear that this limitation upon the power of the legislature of a territory was intended to prohibit interference with the public lands; that when they be-

came private property, they became rightful subjects of legislation, "provided such legislation is" not inconsistent with the Constitution and laws of the United States.

Section 1851, of the Revised Statutes of the United States, is as follows:

"The legislative power of every Territory shall extend "to all rightful subjects of legislation not inconsistent "with the Constitution and laws of the United States. "But no law shall be passed interfering with the primary "disposal of the soil; no tax shall be imposed upon the "property of the United States; nor shall the property "or lands of non-residents be taxed higher than the "lands or other property of residents."

Rev. Stat. (U. S.) Sec. 1851.

In discussing the powers conferred by this section, this court has said:

"As a general thing subject to the general scheme "chalked out by the Organic Act, and such special pro- "visions as are contained therein, the local legislature "has been entrusted with the enactment of the entire "system of municipal laws, subject also, however, to the "right of Congress to revise, alter and revoke at its dis- "cretion. The powers thus exercised by the Territorial "Legislatures are nearly as extensive as those exercised "by any State legislature."

Hornbuckle *v.* Tooms, 18 Wallace, 655.

On the subject of eminent domain it has said:

"It is no longer an open question in this country that "the mode of exercising the right of eminent domain in "the absence of any provision in the organic law pre- "scribing a contrary course is within the discretion of "the legislature. There is no limitation upon the powers "of the legislature in this respect, if the purpose be a

" public one, and just compensation be paid or tendered
" to the owner for the property taken."
Lecombe *v.* R. Co., 23 Wall. 109.

Congress has expressly authorized Territorial Legislatures to create corporations by general law for purposes of irrigation.

" The legislative assemblies of the several Territories
" shall not grant private charters or especial privileges,
" but they may, by general incorporation acts, permit
" persons to associate themselves together as bodies cor-
" porate for mining, manufacturing, and other industrial
" pursuits, or the construction or operation of railroads,
" wagon-roads, irrigating ditches, and the colonization
" and improvement of lands in connection therewith, or
" for colleges, seminaries, churches, libraries, or any
" benevolent, charitable or scientific association."
Rev. Stat. (U. S.) Sec. 1889.

It would be impossible for the corporations authorized by this section to accomplish the objects of their creation unless vested with the right to condemn property whenever the use to which it is put is a public purpose.

Congress has expressly recognized the validity of local legislation by the act of 1866, Rev. Stat., Sec. 2339, appellants' brief, page 5.

All subsequent legislation, including the desert land act, quoted on pages 6 and 7 of appellants' brief, is a clear recognition of the authority in State as well as Territorial Legislatures to legislate on this subject.

And the act of 1891, which is quoted in appellants' brief, page 6, is also a direct recognition of the power of the legislature to legislate on this subject, and these statutes relate to the public lands. There are, however, no public lands involved in this controversy, but if there were this legislation as to water rights would be valid.

These acts have been frequently construed by this Court.

In Basey *v.* Gallagher, the court refers to the case last above cited, and says:

"* * * that the doctrines of the common law declaratory of the rights of riparian proprietors were "inapplicable, or applicable only to a limited extent, to "the necessities of miners, and were inadequate to their "protection; that the equality of right recognized by that "law among all the proprietors upon the same stream "would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance "for mining purposes to points from which it could not "be restored to the stream; that the Government, by its "silent acquiescence, had assented to and encouraged the "occupation of the public lands for mining; and that he "who first connected his labor with property thus situated and open to general exploration, did in natural "justice acquire a better right to its use and enjoyment "than others who had not given such labor; that the "miners on the public lands throughout the Pacific "States and Territories, by their customs, usages, and "regulations, had recognized the inherent justice of this "principle, and the principle itself was at an early period "recognized by legislation and enforced by the courts in "those States and Territories, and was finally approved "by the legislation of Congress in 1866. The views there "expressed and the rulings made are equally applicable "to the use of water on the public lands for purposes of "irrigation. No distinction is made in those States and "Territories by the custom of miners or settlers, or "by the courts, in the rights of the first appropriator "from the use made of the water, if the use be a beneficial one."

Basey *v.* Gallagher, 20 Wallace, 681–682.

See also

Jennison *v.* Kirk, 98 U. S. 453.
Broder *v.* Water Co., 101 U. S. 274.
Atcheson *v.* Petersen, 20 Wall. 513.

This court has also said:

"In other words, the United States by the section said "that whenever rights to the use of water by priority of "possession had become vested, and were recognized by "the local customs, laws, and decisions of the courts, the "owners and possessors should be protected in them, "*and that the right of way for ditches and canals incident* "*to such water rights, being recognized in the same man-* "*ner*, should be acknowledged and confirmed."

Jennison *v.* Kirk, 98 U. S. 460.

The validity of such legislation by a Territory has never been questioned. It has been expressly recognized.

See Sturr *v.* Beck, 113 U. S. 545.

IV.

There are no public lands involved in this controversy, and no land shown to have been acquired from the United States.

There is no finding of fact to such effect. It is said on page 29 of appellants' brief that the court takes judicial notice that "the water in the Rio Grande not held in "private ownership at the time of the cession became the "property of the United States. * * * And also that "the United States are the owners of lands in the valley of "the Rio Grande which are subject to entry under the "public land laws."

We do not understand that the appellants can ask the court to take judicial notice of such facts. There is no presumption of law that the title of lands in the Rio Grande valley was in the Republic of Mexico at the time of the cession.

This court knows from cases decided by it, and a glance

at the official map of the Territory will show that very large areas in the valley were covered by Spanish and Mexican grants. It also knows that a large part, probably the major part of the population of New Mexico, at the time of the acquisition of the Territory by the United States, was located in the Rio Grande valley and in that portion of the valley in central New Mexico where appellee's canal is located. The rule as to judicial notice is quite fully discussed by this court in the case of the U. S. v. Rio Grande Irrigation Co., 174 U. S. p. 690, and we respectfully submit that, according to the principles laid down in that case, the court could not take judicial notice of the title of any particular tracts or parcels of the land. The bill of complaint, as well as the finding of fact, shows that the head-gate of appellee's proposed canal is to be a mile below, or south of, the Indian Pueblo of San Felipe; the ultimate terminus near Isleta, which is also an Indian Pueblo, and that its present proposed terminus is at the city of Albuquerque, the distance from the proposed head-gate to the city of Albuquerque being about twenty-eight miles. An examination of the findings of fact will show that it will be impossible for the court to assume that this canal is to cross a single foot of public land.

We unhesitatingly assert that if the court will investigate this fact upon the theory of judicial notice it will find the fact to be that the canal does not cross any public land from its head-gate to the city of Albuquerque. There is no description in the pleadings or the findings of fact of what particular land the appellants claim, or their source of title. It is to be presumed from the contention of appellants in this case that their title, if any, came from Spain or Mexico. The appellants insist that they had vested rights in the land and water which are pro-

tected by the treaty of Guadaloupe-Hidalgo against any right which the legislature of New Mexico could confer upon the appellee to exercise the right of eminent domain or divert water. If this is true these lands must have been private property at the time of making of the treaty, and the laws of the United States applicable to the public domain can have no application.

The act of Congress of 1866, as well as desert land acts, apply only to the public domain.

Long on Irrigation, Sec. 30; Cruse *v.* McCauley, 96 Fed. 369.

Smith *v.* Denniff, 24 Mont. p. 20; 60 Pac. 398.

Carson *v.* Gentner, 33 Ore. 512; 52 Pac. 506.

V.

"Whether a particular region is a farming neighbor-
"hood, and whether the supplying of water to that neigh-
"borhood constitutes a public use, are questions of fact."

Long on Irrigation, Sec. 5, p. 14.

Lindsay Irr. Co. *v.* Mehrtens, 97 Cal. 676.

Lux *v.* Haggin, 69 Cal. 255.

Aliso Water Co. *v.* Baker, 95 Cal. 268.

VI.

The doctrine of riparian rights has never prevailed in New Mexico, either under Mexico or the United States.

Long on Irrigation, Section 10:

"But common law as to rights of riparian owners is not
"in force in this Territory."

Trombley *v.* Luterman, 6 N. M. 16.

Milheiser *v.* Long, 61 Pacific Rep. 111.

Lux *v.* Haggin, 69 Cal. 255.

The Spanish and Mexican law existed in New Mexico, and continues to exist, except so far as changed by statute. That law as to water rights was based on the principle of prior appropriation. This principle was also early recognized by the Courts of the Pacific and Rocky Mountain States.

Barnett *v.* Barnett, 50 Pacific Rep. 338.

Especially

Insurance Co. *v.* Canter, 1 Pet. 544.
U. S. *v.* Percheman, 7 Peters, 82.
Mitchel *v.* U. S., 9 Peters, 729.
Railway Co. *v.* McGinn, 114 U. S. 546.
And the Insular Cases, 182 U. S.

The common law was enacted in New Mexico on January 7, 1876, in the following language:

"In all the courts of this Territory the common law, "as recognized in the United States of America, shall be "the rule of practice and decision."

Sec. 2871, C. L. 1897.

Subsequently at the same session of the legislative assembly, the following statute was enacted:

"All currents and sources of water, such as springs, "rivers, ditches, and currents of water flowing from nat- "ural sources in the Territory of New Mexico, shall be, "and they are, by this act, declared free, in order that "all persons traveling in this Territory shall have the "right to take water therefrom for their own use and "that of the animals under their charge." (Comp. Laws of N. M., 1897, Sec. 52.)

The following are also provisions of the statutes of New Mexico antedating the enactment of the common law as the rule of practice and decision:

1. "No inhabitant of this Territory shall have the right " to construct any building to the impediment of the irri- " gation of lands or fields, such as mills or any other prop- " erty that may obstruct the course of the water, as the " irrigation of the fields should be preferable to all others.

* * * * * * *

6. "All rivers and streams of water in this Territory, " formerly known as public ditches or acequias, are hereby " established and declared to be public ditches or ace- " quias."

14. " The provisions of this act shall apply only to such " ditches as have been heretofore and are known and " regarded as community ditches, under the laws of this " Territory and under the provisions of this act, shall be " construed to mean such ditches as are not private and " such as are not incorporated under the laws of this " Territory or some other State or Territory, and are " held and owned by more than two owners as tenants in " common, or joint tenants.

* * * * * * *

23. " All the inhabitants of the Territory of New " Mexico shall have the right to construct either private " or common acequias, and to take water for said acequias " from wherever they can, with the distinct understand- " ing to pay the owner through whose land said acequias " have to pass a just compensation taxed for the land " used.

24. " If the owner or owners of lands, where a new " ditch for an acequia is to be made, should ask an " exorbitant price as a compensation therefor, which " shall not be satisfactory to the owner or owners of such " acequia, it shall be the duty of the probate judge of " the county in which it may occur to appoint three skil- " ful men of well-known honesty, to make an appraise- " ment thereof and fix the compensation, which, once " done, shall be executed and without appeal."

Compiled Laws of N. M., 1897, Sections 1, 6, 14, 23, and 24.

This was all the legislation bearing on the subject until

the act of 1887, under which appellee claims its rights. These enactments clearly show that it never was the purpose of the legislature to adopt the common law as to water rights. The common law provisions were locally inapplicable.

This court in the case of Walker *v.* Railroad Company, 165 U. S. 604, in reference to the difference between the civil and common law as to surface waters, said:

"If a case came to this court from one of the States "in which the doctrine of the civil law obtains, it would "become our duty, having respect to which is a matter of "local law, to follow the decisions of that State. And in "like manner we should follow the adverse decision in a "case coming from one of the States in which the common-"law rule is recognized. New Mexico is a Territory, but "in it the legislature has all legislative power, except as "limited by the Constitution of the United States and the "organic act and the laws of Congress appertaining "thereto."

Walker *v.* Ry. Co., 165 U. S. 604.

This principle is equally applicable in determining whether the common law as to riparian rights is in force in New Mexico. We have shown that both the legislature and the courts have held otherwise. It would seem that appellants are basing their contention upon the theory that the common law in this respect obtains, although the proposition is not definitely stated. Many of the authorities cited in the brief are from States where the common law in that particular prevails.

It is, of course, important in this case. If the law of prior appropriation prevails, and we insist that it does, the appellee has the right to divert surplus water from the river. The legislature could confer upon it the power to do so, provided the diversion was for a public purpose, and a beneficial use was made of the water.

VII.

When the right of the plaintiff to exercise the right of eminent domain is judicially examined it will be found to exist.

Appellant denies this proposition, and bases his denial upon the findings of fact XV and XVI.

Finding XV: "That the plaintiff is not the owner of "any land along the line of its proposed canal or elsewhere."

Finding XVI: "That there is no evidence that the "plaintiff has any contract with or employment by any "person who is the owner of lands irrigable from said "proposed canal for the conduct of water upon such lands, "or that the owner of any lands not now irrigated from existing acequias desires or intends to irrigate such lands "from plaintiff's canal when completed." And appellants furthermore contend that the proposed use of water is not a public purpose.

We submit that there is nothing whatever in these findings to sustain the contention of the appellant that "this "is a purely speculative enterprise which seeks, by taking advantage of natural conditions arising out of the "topography of the country, and the peculiar conditions "surrounding the cultivation of the land by means of "irrigation, to compel the owners of the soil to abandon "means of irrigation entirely satisfactory to them, and "adopt others alleged to be more progressive." We respectfully submit that the same proposition might be urged against persons proposing the construction of a railroad through a country already served by other means of transportation or railroads already constructed. The compulsion must come from superior facilities or cheapened cost.

It is perfectly plain that the moment this company took or attempted to deprive any owners of existing ditches of water now appropriated and used by them, a court of equity would stop them from so doing by a writ of injunction. Appellant attempts to draw a distinction between a canal and a railroad, so far as the right to exercise the right of eminent domain is concerned. We submit that he shows neither reason nor authority for such distinction. It is just as reasonable to require a railroad company to own its own freight to be transported or to obtain its own patrons before exercising the right of eminent domain, as it is a canal company. People may well say, "When you have constructed your ditch we will talk "to you. You have no ditch now; you may never have "any. We will not contract with you until you have con- "structed it. We know that the plaintiffs are opposing, "or are about to oppose, your project, and you may never "be able to construct it for that reason. When you have "done so, we will come to you." Besides, if no patrons are secured, the taking of water will not amount to an appropriation, and the right of way, which is a mere easement, will revert to the original owners.

The appellant proceeds to quote cases to the effect that private property cannot be taken for a private purpose, under the power of eminent domain. A proposition that certainly nobody will deny. What we insist is, that it is not necessary that this company should own land of its own, or have secured contracts with prospective customers prior to its construction of its ditch.

We will consider the authorities cited in appellant's brief.

The first case simply decides that a railroad intended, not for the service of the public generally, but only a small section of it, and that some of the duties required

of it by the law of its creation could not be performed by it at all, could not be authorized to condemn property. *In re* Niagara Falls & Whirlpool Ry. Co., 108 N. Y. 384.

Noble *v.* Union River Logging Co. merely decides that the Secretary of the Interior cannot revoke an act of a prior Secretary so as to disturb vested rights. 147 U. S. 172.

The opinion of Secretary Noble, that a railroad constructed for the purpose of conveying the logs and lumber of a single milling company is not constructed for a public purpose, is unquestionably sound. If pertinent here, it is for the purpose of showing that the ownership of lands by the appellee, which it proposes to irrigate, would add nothing to its claim of right to exercise the power of condemnation.

In Lumbering Co. *v.* Johnson, 46 Pac. Rep., 790, speaking of the question of public use of a railroad, the opinion says, "that it is determined by the fact that the proposed "road is intended as a highway, for the use of the public "in the transportation of freight and passengers, and it can "make no difference that its use may be limited, by circum- "stances, to a small part of the community. Its character "is determined by the right of the public to use it, and "not by the extent to which that right is exercised. De- "camp *v.* Railroad Co. 47 N. J. Law, 43; Phillips *v.* Wat- "son, 63 Iowa, 28; 18 N. W. Rep. 659; Ross *v.* Davis, "97 Ind. 79. If everyone having occasion to use the "road as a passenger, or for the transportation of freight, "may do so, and of right may require the plaintiff to "serve him in that respect, it is a public way, although "the number actually exercising the right is very small."

Bridal Veil Lum. Co. *v.* Johnson, 46 Pacific Rep. 790; 30 Oregon, 205.

In re Deansville Cem. Assn., 66 N. Y. 569, the court decides that it is a judicial question, and that the taking of land to be laid out into cemetery lots and be sold to private parties is not a proper exercise of it.

Eureka Basin W. & M. Co., 96 N. Y. 42, decides that the power cannot be exercised to acquire real estate for the construction of wharves, which would not be open to public control or general public use.

We fail to see anything in 99 N. Y. 12. In that case the court simply held that a railroad switch built for the use of a brickyard was not for public use, but private use.

In re Rochester H. & L. Co., 110 N. Y. 119, decides that property of a steamboat company, although used for the company as a common carrier, was not held by virtue of any exercise of right of eminent domain, but was acquired as private property. It was not held upon a public trust by the authority and under the ward and control of the State, and was therefore subject to condemnation.

In re Split Rock Cable Road, 28 N. E. Rep. 506, the court, referring to the Niagara Falls case, 108 N. Y. 375, holds that "under the doctrine of this and other cases, "a possible limited use by a few, and not then as a right, "but by way of permission or favor, is not sufficient to "authorize the taking of property against the will of the "owner."

Apex Transportation Co. *v.* Garbode, 52 Pac. Rep. 573, holds that "public use" is a judicial question, and that a skid road to be built solely to facilitate the business of a private company, mainly passing and terminating at each end in the land of the company, inaccessible to the public, and not connecting at any point with a public highway, is not a road for the public use.

Con. Channel Co. *v.* C. P. R.R. Co., 51 Cal. 269, decides

that a flume to take tailings from the mine of the owner, or to enable him to deposit tailings on his land, is not a public purpose.

People *v.* Robinson, 53 Cal. 694, is to the same effect—a railroad to haul the coal of one coal company is not a railroad for a public purpose.

We respectfully submit that the appellee brings itself within the rules laid down in these and other authorities cited by appellant.

"It is settled by all the authorities that the use of water "for irrigation, when distributed by an irrigation com- "pany, is a public use."

Long on Irrigation, Sec. 4, p. 12, and authorities there cited.

"In the case of the public domain it is not essential "that the appropriator should have acquired or have the "right to acquire title to the land upon which the water "is to be used, and an alien may make a valid appropria- "tion of water on the public land, although he may be "incompetent to acquire title to the land itself. And an "alien may acquire and hold a ditch and water right "until office found as against collateral attacks by third "person other than the Government and in the absence "of forfeiture of office found may convey title to his "grantee."

Long on Irrigation, Sec. 35.
Ely *v.* Ferguson, 91 Cal. 187.
Santa Paula Water Works *v.* Peralta, 113 Cal. 38.
Toohey *v.* Campbell (Mont. 1900), 60 Pac. 396.
Thorpe *v.* Tenem Ditch Co., 1 Wash. 566; 20 Pac. 588.

Appellee does not propose to take water out of the river and carry for itself or for any particular person or persons, but to take it out, sell and deliver it to all alike, who see fit to patronize it. Its rates are required to be uniform for all. See section 17, par. 5 of the act of

1887, under which it is incorporated and claims the right of eminent domain. Irrigation is one of the declared purposes of the act and of its articles of incorporation. It needs no citation of authority to show that its rates are the subject of legislative control. We cite, however:

Munn *v.* Illinois, 94 U. S. 113.
Chicago, &c., Ry. Co. *v.* Wellman, 143 U. S. 339.
Budd *v.* N. Y. *id.* 517.
Brass *v.* Stoesr, 153 U. S. 391.
Spring Valley Co. *v.* San Francisco, 82 Cal. 286.
Same *v.* Schottler, 110 U. S. 347.

This company can be compelled by law to furnish water to all who apply for it to the extent of its capacity.

29 Am. and Eng. Enc. of Law, 19.
Hangen *v.* Albina Light Co., 21 Oregon, 411.
Price *v.* Riverside Co., 56 Cal. 31.
Combs *v.* Agricultural Ditch Co., 28 Pac. 966; 17 Colo. 146.

The Supreme Court of Arizona has very fully considered the question as to whether the taking of water for purposes of irrigation is a public purpose, and fully reviews the authorities. We cannot quote at length from the opinion, and content ourselves with citing it.

Oury *et al. v.* Goodwin, 26 Pac. 376 (Arizona).

This court, we respectfully submit, has fully settled this proposition in Fallbrook Irrigation Co. *v.* Bradley, 164 U. S. 112. We quote therefrom as follows:

"The use must be regarded as a public use, or else it "would seem to follow that no general scheme of irriga- "tion can be formed or carried into effect. In general, "the water to be used must be carried for some distance "and over or through private property which cannot be

"taken *in invitum* if the use to which it is to be put be "not public, and if there be no power to take property by "condemnation it may be impossible to acquire it at all. "The use for which private property is to be taken must "be a public one, whether the taking be by the exercise "of the right of eminent domain or by that of taxation. "Cole *v.* Le Grange, 113 U. S. 1. A private company "or corporation without the power to acquire the land *in* "*invitum* would be of no real benefit, and at any rate the "cost of the undertaking would be so greatly enhanced "by the knowledge that the land must be acquired by "purchase, that it would be practically impossible to "build the works or obtain the water. Individual enter- "prise would be equally ineffectual; no one owner would "find it possible to construct and maintain waterworks "and canals any better than private corporations or com- "panies, and unless they had the power of eminent do- "main they could accomplish nothing. If that power "could be conferred upon them it could only be upon the "ground that the property they took was to be taken for "a public purpose."

* * * * * * *

"We think it clearly appears that all who by reason of "their ownership of or connection with any portion of the "lands would have occasion to use the water, would in "truth have the opportunity to use it upon the same terms "as all others similarly situated. In this way the use, so "far as this point is concerned, is public because all per- "sons have the right to use the water under the same cir- "cumstances. This is sufficient."

Fallbrook Irrigation District *v.* Bradley, 164 U. S. 163.

The court sustained a law taxing all the real property in the irrigation district, whether directly participating in the benefits of the ditches or not, in order to pay the cost of construction. We think, therefore, that the question as to whether irrigation of lands in an arid country is a public purpose is settled.

We also think it is equally clear that so far as the organization of this appellee is concerned, under the authorities above reviewed, it brings itself clearly within the criteria that constitute a corporation discharging a duty as a public agency.

VIII.

The right to the use of water for the purposes of irrigation does not depend upon the ownership or occupation of land by the person or corporation diverting the water from a stream.

If, after it is diverted, application of it is made within a reasonable time to the irrigation of land, or any other beneficial use, either by the person or corporation diverting it, acting alone, or in conjunction with others, the appropriation becomes complete.

Appellant asserted in the court below, and still seems to contend in effect that "the present is the first instance "in which a company formed for the construction of an "irrigating canal has attempted to assert rights in a court "of justice in opposition *to the rights of owners of all "the lands subject to be irrigated by the canal.* There is "no finding of fact in this case upon which the statement "that the five persons who are the defendants in this case "are the owners of all the land to be irrigated by the "proposed canal. There is no finding as to how much "of the land, subject to such irrigation, they own or "control. The only finding of fact on this subject is the "following:

"XVIII. That some of the defendants and some of "their associates are the owners of lands through which "the plaintiff proposes to construct its canal."

We submit that the defendant must rest his case on this finding of fact, and that it does not bear out the statement in his brief. The counsel for appellant then quotes at length from Wheeler *v.* Northern Col. Irr. Co., 17 Pac. 498; 10 Colo. 582. We quote from that case the following, and assert that it is the law of this case, whenever the *question of appropriation can be properly raised.*

"But to constitute a legal appropriation, the water "must be applied within a reasonable length of time to "some beneficial use; that is to say, the diversion ripens "into a valid appropriation only when the water is utilized "by the consumer, though the priority of such appro- "priation may date, proper diligence having been used, "from the commencement of the canal or ditch." The "constitution unquestionably contemplates and sanctions "*the business of transporting water for hire from the nat-* "*ural streams to distant consumers.* The Colorado doc- "trines of ownership and appropriations (as declared in "the constitution, statutes, and decisions), necessarily "give the *carrier* of water an exceptional status; a status "different in some particulars from that of the ordinary "common carrier."

The case clearly and distinctly announces the doctrine that the carrier need not be the consumer. We submit that none of the cases cited in appellant's brief are contrary to this proposition, and none of them hold that it is necessary for the diverter and carrier to obtain his consumers before he exercises the right of eminent domain, and takes out his ditch. We respectfully submit that this question of appropriation or no appropriation cannot be raised, except between two rival and conflicting claimants of the water, not to prevent the construction of the ditch. The findings of fact by the court are to the effect that there is surplus water in the river subject to

appropriation. Whenever appellee takes water from the river, to which appellants are entitled, the law gives them an ample remedy by injunction. Until then their complaint is premature.

Many of the cases cited by appellant under this head seem to us to be inapplicable. The others seem to us to sustain the contention of appellee. We will briefly notice some of them.

Becker *v.* Marble Creek Irr. Co., 49 Pac. 893; 15 Utah, 225, holds that a prior appropriator must use the water he seeks to appropriate, and must not let it run to waste. He can hold, as against a subsequent appropriator, only what is so used.

Combs *v.* Agricultural Ditch Co., 17 Colo. 146; 28 Pac. 966, holds that diversion, not followed by beneficial use, does not amount to an appropriation. The amount diverted in excess of the user is not appropriated.

Creek *v.* Boseman Water Works Co., 15 Mont. 121; 38 Pac. 459, decides that a prior diverter of all the waters in a stream, which he did not use, could not deprive a subsequent diverter of the right to appropriate, by selling to a third party after the subsequent diversion.

Senior *v.* Anderson, 115 Cal. 496; 47 Pac. 454, is to the same effect, and also decides that the first diverter is not limited to the amount of water applied to a beneficial use during the first or second year's diversion, but has a reasonable length of time to so apply it. This, it seems to us, does not sustain appellant's contention that appellee must procure its customers in advance.

Smith *v.* Hawkins, 110 Cal.; 42 Pac. 453, holds that non-user for five years under California statute forfeits rights of diverter.

Simpson *v.* Williams, 18 Nev. 432; 4 Pac. 1213, decides that the diverter is only entitled to the amount used.

Barrows *v.* Fox, 98 Cal. 63; 32 Pac. 811, is to the same effect.

Lux *v.* Haggin, 49 Cal. 225; 10 Pac. Rep. 675, changed the law of California, and decided that riparian owners held rights in the water. Nevertheless, however, the decision holds that the water may be taken for a public use, just compensation being first made or paid into court, and that water to supply farming neighborhoods is a public use.

Vernon Irrigation Co. *v.* Los Angeles, 106 Cal. 247; 39 Pac. Rep. 762, holds that the city of Los Angeles, as successor to the Pueblo, has become the owner of all the water in the Los Angeles river, in accordance with Mexican law and by presciption. There is no such state of facts in this case.

See especially cases cited in the opinion of the supreme court of the Territory, Transcript, p. 57, citing:

Wheeler *v.* Irrigation Co., 17 Pac. 487; 10 Colo. 582.
Combs *v.* Ditch Co., 17 Colo. 148.
Broder *v.* Mining Co., 101 U. S. 274.
Ditch Co. *v.* Bennett.

The provisions of the constitution of the State of Colorado on the subject of water rights do not make the decisions of that State at all exceptional on that question. The legislature of the Territory, as we think we have shown, has full and ample power to grant the right of eminent domain for the purpose of constructing ditches, provided it does not conflict with the constitution and laws of the United States. In this connection we beg leave to suggest that southern Colorado was acquired under the treaty of Guadalupe-Hidalgo, and that very many of the largest canals in the State are within that part of the State acquired under the treaty; and some of

the cases cited for the proposition for which we are contending are located in that part of the State. If appellant's contentions were correct in reference to the treaty, it would be applicable to the provisions of the constitution of Colorado or any other State carved out of territory acquired from Mexico, as well as to territorial legislation. To sustain the proposition that a ditch company must be the owner of land to be irrigated or must have by contract previously to the construction of the ditch, thereby become the agent of the land owners, would have prevented the construction of almost all the ditches in Colorado and Arizona as well as in southeast New Mexico, and prevented the development of the arid region. For the ditch company not to be the owner of the land but to act as a *quasi* public servant makes the construction of the ditch less of a monopoly and more of a public agency.

Long on Irrigation, after speaking of Colorado, says: "In other States the statutes authorizing the exercise of the "right of condemnation have been held constitutional on "the ground that the use contemplated is a public use," citing Oury *v.* Goodwin (Ariz.) 26 Pac. 376; Ellinghouse *v.* Taylor, 19 Mont. 462; Paxton, etc., Canal and Land Co. *v.* Farmers' and Merchants' Irr. and Land Co., 45 Neb. 884.

See especially Cummings *v.* Peters, 56 Cal. 593.

The Colorado statute for condemning right of way was passed by the first legislative assembly of that Territory in 1861.

See Long on Irrigation, Sec. 62, pp. 111, 112.

Yunkers *v.* Nichols, 1 Colo. 551.

The appropriation of water does not become complete till the water has been applied to some beneficial use.

"But while the water must be diverted with the intent " to apply it to some beneficial use, it is not necessary, " to constitute a valid appropriation, that it should be " diverted for any particular use, and the use to which " the water is put may be changed without the appropri- " ator losing his right thereto. That is, water appro- " priated for one purpose may be afterwards used for " another purpose. Thus, water appropriated for irriga- " tion may be used for other purposes by one who " succeeds to the rights of the appropriator."

Long on Irrigation, Sec. 45, p. 85.

Upon what finding of fact is the contention of appellants that the taking out of this ditch is for purely a speculative purpose? It must be upon Findings XIV, XV, and XVI. That is to say, upon the propositions that appellees own no lands, and have not by contract become the agent of land owners. We think we have shown that these conditions are not prerequisites to the exercise of the power of eminent domain. But what right have the appellants to complain of the speculative character of the enterprise? If they are prior appropriators their rights are secure against any injury from speculation on the part of the appellee. If the appellee can secure customers, and apply the whole or any part of the surplus water, which the court below has found to exist, to a beneficial use, why should the appellants be heard to complain if not compelled to patronize the appellee's ditch?

This company must make its rates uniform; it is subject to legislative regulation as to its rates. If it secures an application of the surplus water to a beneficial use through its patrons, the enterprise is a success and a public benefit, otherwise not. How can it be called speculative, any more than a railroad, a manufacturing establishment, or any other business undertaking?

IX.

The appellants cannot assume to represent the community ditches referred to in the record. We insist that they can represent no interests but their own, and that only so far as to litigate the right of the appellee to go on their land, survey its line, and exercise the right of eminent domain.

The legislature has made these community ditches corporations, and authorized them to sue and be sued, and suits affecting the taking of the water should be in their names.

"All community ditches or acequias now constructed or "hereafter to be constructed in this territory, shall, for the "purposes of this act, be considered as corporations or "bodies corporate, with power to sue or be sued as such."
Compiled Laws N. M. (1897), Sec. 8, act of 1889.

X.

The appellants have shown no right to represent any interests except their own.

The court below went further than it should have gone in recognizing the defendants as representing any parties in interest other than themselves.

The cross complaint prays for an injunction against the exercise of the right of eminent domain, and also the diversion of the water by appellee.

The cross complaint was based upon the propositions that there was no surplus water to be diverted, and that appellants and their associates as riparian proprietors were entitled to the use of all the water in the river. The court, by findings of fact from IV to XIII, inclusive,

Transcript, pp. 34–5, disposes of this contention of appellants.

Upon what theory of law can the five appellants who were parties to the cross-bill assume to represent thousands of people living along the Rio Grande, below the proposed terminus of this ditch? If they can do this for the purpose of protecting these thousands against the taking of water, which they own as prior appropriators, no reason suggests itself why the guardianship of these five persons should not be extended over the other thousands living along the Rio Grande in Texas and the Republic of Mexico. What concern have these five appellants with the injury, if any, which persons living below the line of the proposed ditch may suffer? We deny that it has been shown that they would suffer any injury at the hands of the appellee.

Not one of these persons would be bound by any decree against them in this cause as to rights appellee can exercise under its charter and the findings of fact made by the court. The proposition that courts punish persons not parties to the record, made by appellants, has no application here. The reason given for punishment in such cases is that the violation is with notice of the injunction and a contempt of court. We undertake to say that such a person is not bound by anything else in the decree not relating to the injunction.

In re Lennon, 166 U. S. 554.

Appellant cites two decisions of this court for the proposition that these five persons can represent thousands of other persons.

The first case was a suit for the distribution of a fund or property claimed by several thousand preachers. The

suit could not be proceeded with unless all parties interested were before the court.

Smith *v.* Swormstead, 16 How. 302.

The other case was a suit in the Court of Claims, brought by "Commissioners" selected by a large portion of the Cherokee Indians to bring suit for a fund which belonged to the Indians as a community.

United States *v.* Old Settlers, 148 U. S. 480.

A very different situation from the position of appellants. No proof shows that they have been selected by anybody. It was not necessary for the assertion and protection of their own rights as claimed by them, and the determination of them by the court that everybody else should be represented before the court. The persons whom the court below refused to recognize them as representing are not similarly situated. No relief can be granted restraining appellee from diverting water under the findings of fact that there is a surplus of water subject to appropriation. Under this state of facts appellants will not be heard to say that you may have the right to divert and appropriate water as to us, but we represent several thousand people, from twenty to a thousand miles below your proposed ditch, and as you might injure them we ask that you be enjoined on that account. Will it not be time enough for the courts to interfere in behalf of these thousands when they show some injury to their rights, and come into court and ask for it?

In the opinion in Smith *v.* Swormstead, *supra*, we find the following:

"Story, J., in his valuable treatise on equity pleadings, "after discussing this subject with his usual research and "fullness, arranges the exceptions to the general rule as

" follows: 1. Where the question is one of a common or " general interest, and one or more sue or defend for the " benefit of the whole. 2. Where the parties form a vol- " untary association for public or private purposes, and " those who sue or defend may fairly be presumed to rep- " resent the rights and interests of the whole; and 3. " Where the parties are very numerous, and though they " have or may have separate and distinct interests, yet it " is impracticable to bring them all before the court.

" In this latter class, though the rights of the several " persons may be separate and distinct, yet there must be " a common interest or a common right which the bill " seeks to establish or enforce. As an illustration, bills " have been permitted to be brought by the lord of a " manor against some of the tenants, and *vice versa*, by " some of the tenants, in behalf of themselves and the " other tenants, to establish some right, such as suit to a " mill, or right of common, or to cut turf. So by a par- " son of a parish against some of the parishioners to es- " tablish a general right to tithes, or, conversely, by some " of the parishioners in behalf of all to establish a pa- " rochial modus.

" In all cases where exceptions to the general rule are " allowed, and a few are permitted to sue and defend on " behalf of the many, by representation, care must be " taken that persons are brought on the record fairly " representing the interest or right involved, so that it " may be fully and honestly tried."

See also Mayor, etc., of Georgetown *v.* Alex. Canal Co., 12 Peters, 94.

It seems too plain to require discussion that these thirteen or more community ditches, thus made corporations or *quasi* corporations, should bring any suits for the protection of the rights which the persons, members of the corporation, or community, may have in water flowing through these ditches. It seems equally plain that all of these ditch corporations could be made actual parties to a suit, and that all that was properly involved

in this suit was appellants' right to exercise the right of eminent domain. As to the persons below the terminus of the ditch, the findings of the court that there is water in the river subject to appropriation is equally as conclusive as they are upon the appellants themselves.

We respectfully submit that there is no error in the record, and the decree of the court below should be affirmed.

WILLIAM B. CHILDERS,
Counsel for the Appellee.

Supreme Court of the United States.

No. 16.—October Term, 1902.

Tomas C. Gutierres et al., Appellants, vs. The Albuquerque Land and Irrigation Company.	Appeal from the Supreme Court of the Territory of New Mexico.

[February 23, 1903.]

This litigation was begun by the appellee, in the District Court for the Second Judicial District of the Territory of New Mexico, within and for the county of Bernalillo. In the bill of complaint equitable relief was sought against the now appellants. It was alleged, in substance, that plaintiff, on December 31, 1897, became a body corporate, pursuant to the provisions of an act of the general assembly of the Territory of New Mexico, approved February 24, 1887, for the purpose of constructing a canal, ditch and pipe line between named points in the county of Bernalillo, in the Territory of New Mexico; that, as preliminary to the construction of such canal, ditch and pipe line, a survey of lands along the proposed route thereof was necessary, and such survey was authorized by law; and that the defendants, asserting ownership of lands along such proposed route, had forcibly prevented the employees of the plaintiff from entering on said lands to make survey thereof. It was prayed that temporarily, pending the suit, and perpetually by the final decree, the defendants might be enjoined from further interference with the making of the survey, and there was also a prayer for general relief. In their answer the defendants admitted their interferences with the proposed survey, as complained of in the bill, but asserted their right to do so. Reiterating the allegations of the answer, by cross complaint, a perpetual injunction was asked restraining entry by the plaintiff upon the lands. An order was issued temporarily restraining the defendants, as prayed, and thereafter a demurrer to the answer and cross complaint of the defendant was filed and overruled. After replication by the respective parties the cause was transferred to the District Court of the First Judicial District for the Territory of New Mexico, within and for the county of Santa Fe. In that court trial was had and judgment was entered in favor of the plaintiff perpetuating the preliminary injunction and dismissing the cross complaint of the defendants. The following findings of fact and conclusions of law were embodied in the judgment:

"*Findings of Fact.*

"I. That the plaintiff is a corporation and has complied with the provisions of the laws of the Territory of New Mexico. It is organized for the purpose of constructing a canal from a point on the Rio Grande about twenty-eight miles above the city of Albuquerque to the railroad bridge across said Rio Grande, at Isleta, the initial and terminal points of said canal being within the county of Bernalillo.

"II. That the headgate of plaintiff's proposed canal is to be at a point on the Rio Grande three-eighths (⅜) of a mile below or south of the Indian village of San Felipe, about twenty-eight miles above the city of Albuquerque; that the ultimate terminus or point of discharge into the river is at the railroad bridge near Isleta, the entire length of the canal to be about thirty-five (35) miles. The present proposed terminus is at the city of Albuquerque.

"III. That the engineer of the company was proceeding with a survey of the line between Albuquerque and the headgate when defendants interfered with and obstructed the said engineer in the making of said survey.

"IV. That the capacity of the said proposed canal is two hundred and ten (210) cubic feet of water per second.

"V. That there are at present thirteen ditches taking water from the river between the proposed headgate of plaintiff's canal and the Albuquerque, and seven between Albuquerque and the Indian town of Isleta.

"VI. That the aggregate capacity of all the said old ditches is four hundred and ninety-eight (498) cubic feet per second, and the court finds that there has been a valid prior appropriation by the owners of said old ditches of the said four hundred and ninety-eight (498) feet per second of water.

"VII. That during a few months or parts of the summer months of the years 1894, 1895, 1896 and 1897 there was no surplus water flowing in the river at the proposed headgate, but during a large majority of the months of each of these years there was a large amount of surplus water flowing past that point, and that those years were the only years within ten or twenty years in which the river was dry at or above Albuquerque.

"VIII. That in a majority of the last ten years there has been surplus water flowing in the said river at the proposed headgate at all times.

"IX. That the river became dry at Albuquerque about the last of June, 1894, and remained so for twenty-two days, and also in June, 1896, for a number of days, the court being unable to find the exact number or length of time from the evidence.

"X. That the months of June, July, August and Semptember are the 'dry season.'

"XI. That the planting and growing season in the Rio Grande Valley begins in February and ends with October.

"XII. That very few farmers served by the present ditches sow wheat oats, barley or rye in the fall of the year, but do so in the spring, beginning during February or March and that very little, if any, of the water now appropriated is used for these crops after June 15th, but the water is used for chili, corn, alfalfa and melons after that time, and for alfalfa as late as October.

"XIII. That for all the months in most years and for most of the

months in every year there is a surplus of water flowing in the Rio Grande over and above the amount appropriated by said old ditches.

"XIV. The court finds that there is no evidence that plaintiff relies on any source of water supply than the Rio Grande or that the proposed canal of plaintiff is expected or intended to receive and distribute stored waters.

"XV. That the plaintiff is not the owner of any lands along the line of its proposed canal or elsewhere.

"XVI. That there is no evidence that plaintiff has any contract with or employment by any person who is the owner of lands irrigable from said proposed canal for the conduct of water upon such any lands, or that any owner of lands not now irrigated from existing acequias, desires or intends to irrigate such lands from plaintiff's canal when completed.

"XVII. That the proposed canal of the plaintiff will cross and recross the existing acequias of Bernalillo nine times within a distance of one mile of its length.

"XVIII. That some of the defendants and some of their associates are the owners of lands through which the plaintiff proposes to construct its canal.

"*Conclusions of Law.*

"I. That the plaintiff corporation is entitled to exercise the power of eminent domain.

"II. That the plaintiff, by the filing of its articles of incorporation with the secretary of the Territory of New Mexico, and complying with the provisions of the act under which it is incorporated, has acquired a right to construct its canals and reservoirs to divert through its proposed canal surplus and unappropriated waters flowing in the Rio Grande, and that such a right of eminent domain does not depend upon the ownership of lands by plaintiff or the employment of plaintiff prior to the construction of its canal by owners of lands to carry waters for such owners.

"III. That the defendants, at the time of the filing of the complaint herein, unlawfully obstructed the plaintiff in the exercise of powers lawfully conferred upon it by the act under which it is incorporated.

"IV. That the defendants do not and cannot in this action lawfully represent the rights of such persons claiming a right to the use of the waters of the Rio Grande, by prior appropriation, when the appropriation of such persons was effected at a point below the mouth of the proposed canal of plaintiff.

"V. That the defendants cannot lawfully set up in this action any rights secured to them and their associates or their predecessors in title by the treaty of Guadalupe Hidalgo, and that the allegations of paragraph ten of the answer of defendants with reference to the treaty of defendants are immaterial.

"VI. That the plaintiff is entitled to the relief demanded in the complaint, including a perpetual injunction as prayed for.

"VII. That defendants are not entitled to any part of the relief demanded in their cross complaint, but the same should be dismissed."

A motion to set aside the findings and judgment and for a new trial having been overruled, the cause was taken to the Supreme Court of the

Territory. That court affirmed the judgment of the trial court and adopted as its own the findings of fact made by the judge of the District Court. Thereupon this appeal was allowed.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

The pertinent portions of the Territorial act of February 24, 1887, under which the plaintiff below was incorporated, are noted in the margin.*

It will be seen that the act authorized the formation of corporations for the purpose of constructing and maintaining reservoirs and canals, or ditches and pipe lines, and that two purposes were to be subserved by the formation of such companies, 1, the supplying of water for irriga-

*(Corporation Laws of New Mexico, 1897.)

§ 468. Any five persons who may desire to form a company for the purpose of constructing and maintaining reservoirs and canals, or ditches and pipe lines, for the purpose of supplying water for the purpose of irrigation, mining, manufacturing, domestic and other public uses, including cities and towns, and for the purpose of colonization and the improvement of lands in connection therewith, for either or both of said objects, either jointly or separately, shall make and sign articles of incorporation, which shall be acknowledged before the secretary of the Territory, or some person authorized by law to take the acknowledgment of conveyances of real estate, and when so acknowledged such articles shall be filed with such secretary.

§ 469. Such articles shall set forth: First. The full names of the incorporators and the corporate name of such company.

Second. The purpose or purposes for which such company is formed, and if the object be to construct reservoirs and canals, or ditches and pipe lines for any of the purposes herein specified; the beginning point and terminus of the main line of such canals and ditches and pipe lines, and the general course, direction and length thereof shall be stated.

Third. The amount of the capital stock and the number of shares as definitely as practicable.

Fourth. The term of existence of the company, which shall not exceed fifty years.

Fifth. The number of directors, and the names of those who shall manage the business of the company for the first year.

Sixth. The name of the city or town and county in which the principal place of business of the company is to be located.

* * * * * * *

§ 484. Corporations formed under this act for the purpose of furnishing and supplying water for any of the purposes mentioned in section four hundred and sixty-eight shall have, in addition to the powers hereinbefore mentioned, rights as follows:

First. To cause such examination and surveys for their proposed reservoirs, canals, pipe lines and ditches to be made, as may be necessary to the selection of

tion, mining, manufacturing, domestic and other public uses, including cities and towns; and, 2, the colonization and the improvement of lands in connection therewith. The articles of association of the appellee set out the second of the aforesaid objects as being the purpose for which the company was formed. The organization of the company in conformity to the requirements of the statute is not questioned, and the existence of surplus water over and above the needs of prior appropriators of water at the point where it was proposed to divert the waters of the Rio Grande for the proposed canal is a fact found by the trial court and not disputed either in the Supreme Court of the Territory or in the argument made at bar.

The contentions urged upon our notice substantially resolve themselves into two general propositions: First, that the Territorial act was invalid, because it assumed to dispose of property of the United States without

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the most eligible locations and advantageous routes, and for such purpose, by their officers, agents and servants, to enter upon the lands or water of any person. or of this Territory.

Second. To take and hold such voluntary grant of real estate and other property as shall be made to them in furtherance of the purposes of such corporation.

Third. To construct their canals, pipe lines or ditches upon or along any stream of water.

Fourth. To take and divert from any stream, lake or spring the surplus water, for the purpose of supplying the same to persons, to be used for the objects mentioned in section four hundred and sixty-eight of this act, but such corporations shall have no right to interfere with the rights of or appropriate the property of any persons except upon the payment of the assessed value thereof, to be ascertained as in this act provided. *And provided, further*, That no water shall be diverted if it will interfere with the reasonable requirements of any person or persons using or requiring the same, when so diverted.

Fifth. To furnish water for the purposes mentioned in section four hundred and sixty-eight, at such rates as the by-laws may prescribe; but equal rates shall be conceded to each class of consumers.

Sixth. To enter upon and condemn and appropriate any lands, timber, stone, gravel, or other material that may be necessary for the uses and purposes of said companies.

* * * * * * *

§ 492. That no incorporation of any company or companies to supply water for the purposes of irrigation and other purposes shall have any right to divert the usual and natural flow of water of any stream which by law of 1854 has been declared a public acequia for any use whatever, between the fifteenth day of February and the fifteenth day of October of each year, unless it be with the unanimous consent of all and every person holding agricultural and cultivated lands under such stream or public acequia, and to be irrigated by the water furnished by said stream or public acequia, and that no incorporation of any company or companies shall interfere with the water rights of any individual or company acquired prior to the passage of this act.

its consent; and, second, that said statute, in so far at least as it authorized the formation of corporations of the character of the complainant, was inconsistent with the legislation of Congress and therefore void. These propositions naturally admit of consideration together.

The argument in support of the first proposition proceeds upon the hypothesis that the waters affected by the statute are public waters, the property not of the Territory or of private individuals, but of the United States; that by the statute private individuals, or corporations, for their mere pecuniary profit, are permitted to acquire the unappropriated portion of such public waters, in violation of the right of the United States to control and dispose of its own property wheresoever situated. Assuming that the appellants are entitled to urge the objection referred to, we think, in view of the legislation of Congress on the subject of the appropriation of water on the public domain, particularly referred to in the opinion of this court in *United States* v. *Rio Grande Irrigation Co.*, (174 U.S. 704-706,) the objection is devoid of merit. As stated in the opinion just referred to, by the act of July 26, 1866, (c. 262, sec. 9, 14 Stat. 253, Rev. Stat. sec. 2339,) Congress recognized, as respects the public domain, "so far as the United States are concerned, the validity of the local customs, laws and decisions in respect to the appropriation of water." By the act of March 3, 1877, (c. 107, 19 Stat. 377,) the right to appropriate such an amount of water as might be necessarily used for the purpose of irrigation and reclamation of desert land, part of the public domain, was granted, and it was further provided that "all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

That the purpose of Congress was to recognize as well the legislation of a Territory as of a State with respect to the regulation of the use of public waters is evidenced by the acts of March 3, 1891, (c. 561, 26 Stat. 1095.) By the eighteenth section of the act of 1891 it was provided as follows, (italics not in original):

"SEC. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located

as to interfere with the proper occupation by the government of any such reservation, and all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories," and it may be observed that the purport of the previous acts is reflexively illustrated by the act of June 17, 1902, (32 Stat. 388.)

That act appropriated the receipts from the sale and disposal of the public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands. The eighth section of the act is as follows:

"SEC. 8. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

It would necessarily seem to follow from the legislation referred to that the statute which we have been considering is not inconsistent with the legislation of Congress on the subject of the disposal of waters flowing over the public domain of the United States. Of course, as held in the *Rio Grande case*, (p. 703,) even a State, as respects streams within its borders, in the absence of specific authority from Congress, "cannot, by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property," and the power of a State over navigable streams and their tributaries is further limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. Necessarily, these limitations are equally applicable in restraint of the legislative branch of a territorial government, controlled, as is such body, by Congress. If we assume that a restriction on the power of a Territory similar to that first stated prevails in favor of private owners of lands along a running stream, the act in question clearly is not violative of such rights, for the saue does not attempt to authorize an infringement of them. The water which it is provided may be appropriated is "surplus" water, of any stream, lake or spring, and it is specifically provided in subdivision 4 of section 17 of the act "That no water shall be diverted, if it will interfere with the reasonable requirements of any

person or persons using or requiring the same when so diverted." So, also, in section 25, it is declared "that no incorporation of any company or companies shall interfere with the water rights of any individual or company acquired prior to the passage of this act." The finding of the court below that "surplus" water existed negates the idea that any legitimate appropriation of water which can be made by the appellee can in anywise violate the rights of others.

We perceive no merit in the contention that the proviso in the desert land act of March 3, 1877, declaring that surplus water on the public domain shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights, is an expression of the will of Congress that all public waters within its control or the control of a legislative body of its creation, must be *directly* appropriated by the owners of land upon which a beneficial use of water is to be made, and that in consequence a Territorial legislature cannot lawfully empower a corporation, such as the appellee, to become an intermediary for furnishing water to irrigate the lands of third parties. As all owners of land within the service capacity of appellee's canal will possess the right to use the water which may be diverted into such canal, the use is clearly public (*Fall Brook Irrigation District* v. *Bradley*, 164 U. S. 163,) and appellee is therefore a public agency, whose right to divert water and whose continued existence is dependent upon the application by it within a reasonable time of such diverted water to a beneficial use. Irrigation corporations generally are recognized in the legislation of Congress, and the rights conferred are not limited to such corporations as are mere combinations of owners of irrigable land.

It is conceded on behalf of appellant that, by the laws of Mexico in force when the Territory of New Mexico was ceded to the United States, the use of the waters of both navigable and unnavigable streams was not limited to riparian lands, but extended as well to lands which did not lie upon the banks of the rivers, and that such use was subject to be regulated and controlled by the public authorities. It is however contended that the effect of the statute under consideration is to free the waters from public control and to transfer them to private control, a position which is manifestly unsound, in view of the public nature of such corporations and their liability to regulation by the legislative authority which has in effect created them. The concession above referred to and the implication arising from the statement in the answer and cross bill to the purport that the title of the defendants to their lands was derived, mediately or immediately, from those who held title thereto at the time of the acquisition of New Mexico by the United States, coupled with the finding by the trial court that, after making all due allowances for valid appropriations of water within the portion of the Rio Grande directly affected by

the canal of the appellee, there yet existed a surplus of unappropriated water, warranted the trial court in treating as immaterial the claim asserted in the tenth paragraph of the answer of the defendants to the effect that, by the treaty of cession of New Mexico to the United States, the defendants and their associates acquired the right of user of all the waters of the Rio Grande adjacent to their lands. Neither do we think that the trial court was called upon, at the instance of the defendants, entire strangers in every aspect to other appropriators, to inquire into and pass upon the question whether appropriators of water below the mouth of the proposed canal of appellee would be injured by the construction of the canal. The rights of such persons will not, of course, be injuriously affected by the decree in this cause, and *non constat* but that they may yet intervene for their own protection, if they deem that the construction of the canal will be an invasion of their rights, or that they may be willing to forego objection to the construction of the canal.

On the whole, we are of opinion that the decree of the Supreme Court of the Territory of New Mexico was correct, and it is therefore

Affirmed.

Mr. Justice McKENNA dissents.

True copy.

Test:

Clerk Supreme Court, U. S.